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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 424

**KENNECOTT COPPER CORPORATION,
PETITIONER,**

vs.

**STATE TAX COMMISSION; AND J. LAMBERT GIB-
SON, ROSCOE E. HAMMOND, MILTON TWIT-
CHELL, AND HEBER BENNION, JR., CONSTITUT-
ING SAID STATE TAX COMMISSION**

No. 425

**SILVER KING COALITION MINES COMPANY,
PETITIONER,**

vs.

**STATE TAX COMMISSION; AND J. LAMBERT GIB-
SON, ROSCOE E. HAMMOND, MILTON TWIT-
CHELL, AND HEBER BENNION, JR., CONSTITUT-
ING SAID STATE TAX COMMISSION**

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE TENTH CIRCUIT**

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1945.

CERTIORARI GRANTED NOVEMBER 5, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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[fol. a] [Caption omitted]

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH, CENTRAL DIVISION**

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE TILLMAN D.
JOHNSON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH, PRESIDING IN THE FOLLOWING-
ENTITLED CAUSE:

No. 671 Civil

KENNECOTT COPPER CORPORATION, a Corporation, Plaintiff,

vs.

STATE TAX COMMISSION, and J. LAMBERT GIBSON, ROSCOE E.
HAMMOND, MILTON TWITCHELL, and HEBER BENNION, JR.,
constituting said State Tax Commission, Defendants

COMPLAINT—Filed August 15, 1944

Plaintiff for its cause of action alleges:

1. The grounds upon which the jurisdiction of this court depends are as follows:

(a) Diversity of citizenship between the parties plaintiff and defendants as hereinafter set forth;

(b) The action arises under the constitution and laws of the United States, particularly Article I, Section 8, of the Constitution of the United States, empowering Congress to declare war and prosecute the same, and Article I, Section 10, of the Constitution of the United States, denying that power to the states; the Emergency Price Control Act of 1942, approved January 30, 1942 (56 Stat. 23, as amended October 2, 1942, 56 Stat. 767, 50 U. S. C. App. 901, 902(e)), the purpose of which, among others, was, and is, to secure the maximum necessary production of any commodity essential to the prosecution of the war and for that purpose to make subsidy payments to domestic producers in such amounts and in such manner and upon such terms and conditions as may be determined to be necessary to obtain such maximum necessary production; Executive Order No.

[fol. 2] 9250, Title V, as amended by Executive Order No. 9281 (50 U. S. C. App., Section 901, p. 311), pursuant to authority conferred by said Emergency Price Control Act of 1942, by which order Metals Reserve Company was, and is, authorized to subsidize, if such measure be necessary to insure the maximum production and distribution of any commodity necessary to the successful prosecution of the war; the Second War Powers Act, being the Act of June 28, 1940 (54 Stat. 676), as amended March 27, 1942, c. 199, Title III, Section 301 (56 Stat. 177, 50 U. S. C. App., Section 633, p. 274), whereby the President of the United States was, and is, authorized to allocate all production in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the National defense; and the Fourteenth Amendment to the Constitution of the United States, wherein it is provided that no State shall deprive any person of property without due process of law.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3000.00) Dollars.

2. Plaintiff, Kennecott Copper Corporation, is now, and at all times hereinafter mentioned was, a corporation incorporated and existing under the laws of the State of New York, and is now, and at all said times was, a citizen of the State of New York, and no other State. The defendant, State Tax Commission, is a distinct legal entity created by Article XIII, Section 11, of the Constitution of the State of Utah, and by said Article XIII, Section 11, of said constitution, there was vested in said State Tax Commission, solely and exclusively, the power, among others, of administering and supervising the tax laws of the State of Utah, of assessing mines and equalizing the valuation and assessment of property among and within the several counties, of establishing systems of public accounting, reviewing proposed bond issues, and of revising the tax levies and budgets of the local governmental units. And said provisions of the Constitution of the State of Utah were further effectuated by the Statutes of the State of Utah, more particularly c. 5 of Title 80, Utah Code 1943, especially Sections 80-5-37 to [fol. 3] 80-5-55, inclusive, and 80-5-65 to 80-5-82, inclusive, and said State Tax Commission was empowered thereby, more particularly by Sections 80-5-46(1) and 80-5-76, Utah Code, 1943, to sue and be sued in its own name in any court of

competent jurisdiction, and by Section 80-5-41 to employ, among others, such attorneys, agents, statisticians, experts and other agents and employees as might be necessary in the performance of its duties. Said defendant, State Tax Commission, is a citizen of the State of Utah, and no other State. Defendants, J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell and Heber Bennion, Jr., are members of, and as such members at all times hereinafter alleged constituted, and now constitute, said State Tax Commission. Each of said defendants last named is a citizen of the State of Utah, and no other State.

3. The controversy herein is wholly between citizens of different States, and the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

4. Plaintiff, Kennecott Copper Corporation, is a mining corporation, is and has been the owner of and operating certain mines and mining claims and mining property, leaching plants, precipitating plants, pipe lines and facilities in Bingham Canyon, in the West Mountain Mining District in Salt Lake County, Utah, and for the reduction of ores mined and produced by plaintiff from said mines and mining claims plaintiff is and has been the owner of and operating certain reduction works and milling plants situated in Salt Lake County, Utah, in and in the vicinity of the unincorporated settlement of Magna, in said county and state, distant from said mines of plaintiff approximately 17.2 miles. Plaintiff's said mining property is commonly known as the Utah Copper Mine.

5. In order to recover the metals from the precipitates and concentrates resulting from said operation, said precipitates and concentrates must be smelted and converted into blister copper, which carries copper and other metals, including precious metals, and said blister copper must be refined and the metals therein separated each from the other; and plaintiff has delivered and delivers its said precipitates and concentrates to the American Smelting and Refining Company, which owns and operates a custom [fol. 4] smelter near the Town of Garfield, in Salt Lake County, Utah, approximately three miles distant from plaintiff's said reduction and milling plants at and in the vicinity of Magna; and American Smelting and Refining Company, as a bailee, has received and smelted said precip-

itates and concentrates and converted the same into blister copper, and has thereupon shipped the whole of said product to points outside the State of Utah and has refined said blister copper in its refineries in states other than the State of Utah, and said American Smelting and Refining Company, said bailee, has at all the times herein mentioned returned to plaintiff in separated form the equivalent of the copper, gold, silver and other metals owned by plaintiff. Plaintiff has at all times received from said American Smelting and Refining Company, stored and sold its separated metals outside the State of Utah. Over the period hereinafter referred to and herein involved plaintiff produced by and from its said Utah Copper Mine approximately thirty percent of all copper produced in the United States, and plaintiff's operation in and by its said Utah Copper Mine throughout said period was, and now is, essential to the successful prosecution of the war.

6. On April 11, 1941, the President of the United States by his Executive Order No. 8734, as amended by his Executive Order No. 8875, August 28, 1941 (Vol. 9, U. S. C. Cong. Ser. 1941, pp. 852, 867), created the Office of Price Administration, established an Administrator at its head, and defined the Administrator's duties, among which duties was that of prescribing maximum prices and all elements of cost or price of materials or commodities, and enforcing their observance; and pursuant to authority thus conferred, price schedules were established August 12, 1941, and it was thereby provided, among other things, that no person should sell or offer to sell, buy or offer to buy, or accept delivery of copper at prices higher than the maximum of twelve cents per pound. And by the signature of the President, on January 30, 1942, the Emergency Price Control Act of 1942 became law (c. 26, 56 Stat. 23; 50 U. S. C. App., Section 901, p. 310). And by said Act said Price Administrator was empowered, on behalf of the United States, in such manner and upon such terms and conditions as he should determine to be necessary to obtain the maximum [fol. 5] necessary production of any commodity essential to the successful prosecution of the war, to make subsidy payments to domestic producers of such commodities in such amounts and in such manner and upon such terms and conditions as he should determine to be necessary to obtain such maximum necessary production thereof (50 U. S. C.

App., Section 902(e), p. 319). Metals Reserve Company is, and at all the times herein mentioned was, a corporation created pursuant to Title XV, U. S. C., Section 606(b), being Section 5(d) of the Reconstruction Finance Corporation Act as amended (15 U. S. C., Sections 606(b), 609 (j)), and as such an Agency of the United States. And by said Emergency Price Control Act of 1942 it was provided that "such commodities may be bought or sold or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such Section 5(d), except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section (50 U. S. C. App., Section 902(a), p. 319), which is applicable to such commodity at the time of sale or delivery". And the President of the United States made his Executive Order No. 9250, Title V, as amended by his Executive Order No. 9281 (50 U. S. C. App., Section 901, p. 311), and pursuant to the authority conferred upon him by said Emergency Price Control Act of 1942 created the Office of Economic Stabilization, and at the head of said office he established an Economic Stabilization Director, and authorized said Director to direct said Metals Reserve Company, among others of said corporations created or organized pursuant to said Section 5(d), to use its authority to subsidize, where such measure necessary to insure the maximum necessary production of any commodity.

7. It being found that under said established price ceilings, costs to be encountered in the production of copper and other metals essential to the successful prosecution of the war were too high to insure the maximum necessary production required for armament and other purposes of war, and copper and said other metals in such maximum necessary production being indispensable for said purposes, and stimulation of production of said metals to said maximum necessary production being imperative and being possible only by raising the ceiling prices or by payment of a subsidy for increased production, the National government, impelled by the war emergency and impelled by the exigencies of war, paid, and still pays, subsidies for production of said metals in excess of quotas established jointly by the War Production Board and the Office of Price

Administration. Said subsidies were, and are being, paid by order of the Office of Price Administration, dated February 9, 1942, No. P. M. 2458, and under and pursuant to said order and by virtue of the authority hereinbefore alleged, said Metals Reserve Company pays, and has paid, a subsidy of five cents per pound for copper production over and above said fixed quotas, commencing February 1, 1942. Under this subsidy plaintiff was allotted a quota of 46,000,000 pounds of copper for its said Utah Copper Mine here involved, operated by Utah Copper Company, and it was provided, among other things, that should any property fail to maintain its quota production in any calendar month or months, no subsidy would be paid until the accumulated deficit was made up by over quota production in subsequent months. And it was further provided that where a company operated two or more properties and the production of any property should show a material decrease below its quota, the owning or operating company would be required to account for the decrease, and if found that such decrease had been due to avoidable circumstances, then that the existing quotas of all properties of such company would be cumulated into a single quota for that company, whereupon the subsidy would be paid only upon the excess production over and above the total cumulated company quota.

8. And the Office of Price Administration subsequent to February 9, 1942, issued certain supplementary orders authorizing subsidy payments of an additional five cents and more on copper production, such additional subsidy payments being thereby designated as B and C premiums, and on April 1, 1943, issued its Order No. M. P. R. 356, prohibiting the payment of royalty under mining leases wherein B and C premium payments should be included in the base upon which royalties might be computed, and that order stated that it was necessary and proper to establish maximum royalties paid in the mining of copper and said other metals in order to make certain that subsidies paid by Metals Reserve Company under the subsidy plan should not be dissipated, but should be preserved for the accomplishment of the single purpose of insuring the maximum necessary production of these essential metals. By that order the mine owner was denied participation in the B and C premiums as royalty lest there be thwarted thereby the single purpose in mind, i. e., to insure said maximum neces-

sary production to accomplish which said subsidy payments had been ordered.

9. Pursuant to authority conferred by the Second War Powers Act, being the Act of June 28, 1940 (54 Stat. 676), as amended March 27, 1942, c. 199, Title III, Section 301 (56 Stat. 177, 50 U. S. C. App., Section 633, p. 274), the entire copper production of this plaintiff from its Utah Copper Mine is, and at all times herein mentioned has been, sold and distributed only upon allocation prescribed by the President of the United States as the President has deemed necessary or appropriate in the public interest and to promote the national defense.

10. Under and pursuant to said subsidy, payments thereof are computed on 97 percent of the copper contained by assay in plaintiff's concentrates. Sales of copper produced by plaintiff at its Utah Copper Mine generally follow by three months the concentration of its ores. The copper contained in plaintiff's concentrates produced in December of one year is not available for sale and is not sold before March of the succeeding year, but said subsidies are nevertheless paid by said Metals Reserve Company without regard to date or fact of sale, said subsidies are in no manner related to sales, are not computed on the refined metal produced, and the refined metal is plaintiff's ultimate product and plaintiff's only product that is sold or that is commercial in character. Said subsidy is paid for the sole purpose of insuring maximum necessary production, is based on excess production solely, without regard to the sale or other disposition of the product, and is not reflected in the product's value.

11. By Act of Congress (Revenue Act of 1942, Sections 209, 735, 26 U. S. C. Supp., p. 216), the subsidy payments [fol. 8] here involved were defined as special allowances, not income for purpose of excess profits tax under the Federal Revenue Act, one of the aims of said subsidy plan being that of compensating the mine owner thereby for losses to be incurred by forced or excess mine production, such as lower recoveries due to crowding milling plants and the mining of those ores only that could be produced at the maximum rate, thus resulting in the wasting of ores not readily serving that purpose.

12. Plaintiff was paid, and received, during the calendar year 1943 on account of said subsidy payments made by

Metals Reserve Company under the authority hereinbefore alleged and on plaintiff's excess copper production from its Utah Copper Mine for said year 1943, the sum of \$3,781,421.55.

13. At all times herein mentioned it was provided by the Statutes of Utah, that is to say, Section 80-5-66, Utah Code 1943, that "every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metals in the State of Utah should pay to the State of Utah an occupation tax equal to one percent of the gross amount received for or the gross value of metalliferous ores sold" during the next preceding calendar year; and it was thereby provided that the basis for computing said occupation tax should be the amount of money, or its equivalent, actually received from the sale of all ores or metals during said calendar year. Every person engaged in the business of mining has been, and is, required to make and file with the defendant, State Tax Commission, each year a statement containing the total amount received during the preceding calendar year from the sale of ores and metals (Section 80-5-67 (3), (4)), and plaintiff filed with the defendant, State Tax Commission, in due time its statement accordingly.

14. Notwithstanding the facts hereinbefore alleged, said defendant, State Tax Commission, and said other defendants comprising said Commission, erroneously added the said sum of \$3,781,421.55, the amount of said subsidy payments received by plaintiff as hereinbefore alleged, to the gross amount received by plaintiff from sales of its production made during the calendar year 1943, as though the said sum of \$3,781,421.55 were actually derived from such sales. Upon the total so obtained, said defendant, State Tax Commission, and said other defendants constituting the membership thereof, have erroneously and without authority of law levied against plaintiff an occupation tax for the year 1944 in the sum of \$815,443.35, as though upon sales of metals made by plaintiff in the year 1943. But the total of plaintiff's sales of metals made during the year 1943 on which said occupation tax should have been computed amounted to the sum of \$77,762,913.44, and thereupon an occupation tax of no more than the sum of \$777,629.13 could have been lawfully levied against this plaintiff, the said sum of \$3,781,421.55, the amount of said subsidy pay-

ments, having been made and received neither for nor on account of "metalliferous ores sold", nor were said subsidy payments in any manner related to ~~sales~~ of any kind or character whatever.

15. This plaintiff by its representatives in due time appeared before the defendant, said State Tax Commission, and said other defendants, and orally ~~protested~~ said assessment, and in writing on May 27, 1944, petitioned said defendant, said State Tax Commission, in the manner and within the time provided by law, for the abatement of said unlawful assessment and protested the same upon the grounds herein alleged and therein set forth at length. But said defendant, said State Tax Commission, and said other defendants denied plaintiff's said petition and protest, and unlawfully levied against plaintiff and upon said unlawful assessment a so-called mine occupation tax for the year 1944 in the sum of \$815,443.35, of which the sum of \$37,814.22 was levied upon said subsidy paid plaintiff by the National government for the purpose hereinbefore alleged, and on May 31, 1944, said defendant, said State Tax Commission, did collect from this plaintiff as and for said tax in said part unlawfully levied pursuant to said unlawful assessment made by said State Tax Commission and said other defendants as hereinbefore alleged the sum of \$815,443.35.

16. The Congress of the United States has conferred no right upon the State to tax said subsidy payments, or to seize or appropriate the same, or any part thereof, or in any [fol. 10] manner, or at all, to make said subsidies a source of revenue to the State. The inclusion by the said defendants of said sum of \$3,781,421.55 in said base upon which said occupation tax was computed by the defendant, State Tax Commission, and said other defendants, and upon which said assessment was made by it and them, and the levy thereupon of said additional tax of \$37,814.22 by it and them, were and are beyond the power or authority of said State Tax Commission or said other defendants, were and are contrary to law, and were and are void. Said attempted and unlawful assessment by said State Tax Commission and said other defendants, and said levy thereupon were and are an usurpation of power, were and are an unlawful seizure by said defendants of subsidies paid by the National government in the interest of national defense and to further the prosecution of war, were and are an immediate and

a direct and substantial interference with, and burden upon, the National government and the exercise by the National government of its legitimate function of prosecuting war, were and are an unlawful seizure by the defendants of subsidy payments the National government directed be paid to this plaintiff in the exercise by the National government of its power to wage war and, if permitted, the power of Congress to wage war will be impaired and may be destroyed by the act of others. Not only were said subsidy payments made by the National government to this plaintiff to insure the maximum necessary production of essential metal for use by the National government in the waging of war, to induce this plaintiff and other like industries to enter upon an operation in behalf of the National government and its legitimate function of prosecuting war, and as such secure under the law against seizure by the States or others, but said seizure by said defendants was, and is, wholly without authority from the State of Utah or otherwise or at all, wholly in excess of the power of said defendants, or any of them, was, and is, an arbitrary usurpation of power and a taking of plaintiff's property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 7 of Article I of the Constitution of the State of Utah.

17. This plaintiff further alleges that at the time here- [fol. 11] inbefore alleged, to-wit, on the 31st day of May, 1944, when said defendant, State Tax Commission, exacted payment by this plaintiff of said total sum of \$815,443.35, this plaintiff did pay said tax in said total sum of the defendant, State Tax Commission, but as to said portion thereof levied upon said unlawful assessment, to-wit, the sum of \$37,814.22, levied upon said subsidy payments in the sum of \$3,781,421.55, plaintiff made said payment under protest, demanded that said defendant make the record of its office show payment under protest accordingly, which said defendant did, and said sum according- was not covered into the general fund of the State, but was, and is, being held and retained, as by law provided, until it shall have been finally determined that said tax was lawfully or was unlawfully collected.

Wherefore, plaintiff prays judgment against said defendant, State Tax Commission, and said other defendants for the sum of \$37,814.22, together with interest thereon at the

rate of six percent per annum from the 31st day of May, 1944, and for plaintiff's costs of suit in this behalf incurred.

C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

Office & Post Office Address: 1003 Kearns Building, Salt Lake City, Utah.

Duly Verified:

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 5, 1944

Come now the Defendants and move the court to dismiss this action on the following grounds:

1. That the court has no jurisdiction over the subject matter of the action for the reason that the matter involved herein is not a controversy between citizens of different states in this, that this suit is in fact against the State of Utah and the State of Utah is not a citizen of any state [fol. 12] within the meaning and intent of the law defining this court's jurisdiction;

2. That the court has no jurisdiction over the persons of these defendants for the reason that the State Tax Commission is an agency of the State of Utah and the individual defendants are sued in their representative capacity as members of the State Tax Commission; and that it appears from the body of the complaint that the matter involved is one in which the State of Utah is primarily concerned and that the State of Utah only is concerned with and will be affected by any judgment rendered herein and that therefore the action is essentially an action against the State of Utah;

3. That the complaint herein does not state a claim upon which any relief can be granted by this court.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanechy, State Tax Commission Attorney, Attorneys for Defendants, 236 State Capitol, Salt Lake City, Utah.

Received a copy of the above Motion this 5th day of September, 1944.

C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—September 26, 1944

On this 26th day of September, 1944, plaintiff appearing by C. C. Parsons, its attorney, and defendant by A. H. Nielsen and W. L. Skanchy, its attorneys, and this case came on for hearing on motion to dismiss. The Court heard the arguments of counsel, and denied defendant's said [fol. 13] motion, and defendant given until October 10th to file its answer. Case set for pretrial on October 12, 1944.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 11, 1944

Defendants make answer to Plaintiff's complaint as follows:

1. For answer to Paragraph 1, Defendants deny that there is diversity of citizenship between the parties Plaintiff and Defendant to this action or that this action arises under the Constitution or Laws of the United States as in said Paragraph 1 alleged, or otherwise, or at all, or that any such facts exist, as set forth in said Paragraph, upon which jurisdiction of this court depends.

Defendants admit that the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

2. For answer to Paragraph 2, Defendants deny that the Defendant, State Tax Commission, is a citizen of the State of Utah, or of any state. Defendants admit the other allegations in said Paragraph 2 contained.

3. For answer to Paragraph 3, Defendants deny that the controversy herein is wholly between citizens of different states but admit that the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

By way of affirmative defense to the jurisdictional averments in Plaintiff's Paragraphs 1, 2, and 3 contained, Defendants allege that notwithstanding the State Tax Commission and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell and Heber Bennion, Jr., members constituting said State Tax Commission, are named as Defendants

herein, none of said Defendants has any individual interest in the controversy; that the relief sought against these Defendants, and each of them, is only in their official capacity as representatives of the State of Utah; that the State of Utah is alone to be affected or compelled to pay any judgment which might be rendered against said defendants, and to the State of Utah alone will inure any benefits to accrue or result from any judgment in favor of Defendants herein. Defendants, therefore, allege that this action is one in which [fol. 14] the State of Utah, though nominally not a party Defendant, is, nevertheless, in truth and in fact, the real Defendant and that, therefore, there is no diversity of citizenship herein.

Defendants further allege that this suit is barred by the provisions of the 11th Amendment of the Constitution of the United States, which provides that the judicial power of the United States "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State".

4. Defendants admit the allegations of Paragraph 4.

5. For answer to Paragraph 5, Defendants allege that they have insufficient facts to form a belief, and, therefore, deny the same.

6. Defendants admit the allegations contained in Paragraph 6.

7. For answer to Paragraph 7, Defendants deny that Metals Reserve Company pays and has paid a subsidy of five cents per pound for copper production over and above fixed quotas, but alleges the facts to be as hereinafter set forth in Defendants' affirmative defense.

Defendants otherwise admit the allegations in said paragraph contained.

8. For answer to Paragraph 8, Defendants allege that they have insufficient facts to form a belief and, therefore, deny the same.

9. Defendants admit the allegations of Paragraph 9.

10. For answer to Paragraph 10, Defendants admit that premium payments are computed on ninety-seven per cent of the copper contained by assay in Plaintiff's concentrates.

Defendants deny each and every other allegation in said paragraph contained.

11. For answer to Paragraph 11, Defendants admit that by act of Congress (Revenue Act of 1942, Sections 209, 735, 26 U. S. C. Supp., page 216), premium payments are excluded from the provisions of the excess profits tax under the Federal Revenue Act.

Defendants deny each and every other allegation in said paragraph contained.

12. For answer to Paragraph 12, Defendants allege that they have insufficient facts to form a belief and, therefore, deny the same.

13. For answer to Paragraph 13, Defendants admit that at all times mentioned in Plaintiff's complaint, Section 80-5-66, Utah Code Annotated, 1943, provided:

"* * * every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metal in this state shall pay to the state of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold * * *."

Defendants further admit that every person engaged in the business of mining is required to file with the Defendant, State Tax Commission, each year, a statement containing, among other things, the total amount received during the preceding calendar year from the sale of ores and metals (Section 80-5-67) and that Plaintiff filed with the Defendant, State Tax Commission, in due time its statement accordingly.

Defendants otherwise deny each and every other allegation in said Paragraph contained.

14. Defendants deny the allegations in Paragraph 14 contained.

15. For answer to Paragraph 15, Defendants admit that Plaintiff, in due time, protested the assessment made by the State Tax Commission and in the manner and within the time provided by law petitioned for the abatement of said tax in the sum of \$37,814.22, but that said Defendant, State Tax Commission, denied Plaintiff's Petition and Protest and levied against the Plaintiff a Mine Occupation Tax

for the year 1944 in the sum of \$815,443.35 and did there-
after collect from this Plaintiff said amount.

[fol. 16] 16. For answer to Paragraph 16, Defendants deny each and every allegation therein contained.

17. For answer to Paragraph 17, Defendants admit that at the time therein alleged, to-wit, on the 31st day of May, 1944, Plaintiff paid to the State Tax Commission the said occupation tax in the total sum of \$815,443.35 and that Plaintiff, as to the sum of \$37,814.22 made said payment under protest and demanded that the State Tax Commission make the record of its office show payment under protest accordingly, which said Defendant did, and said sum accordingly was not covered into the General Fund of the State, but is being held and retained as by law provided until it shall have finally been determined whether such tax was lawfully or unlawfully collected.

Defendants otherwise deny the allegations in said Paragraph contained.

For further and separate defense, Defendants allege as follows:

1. That on February 9, 1942, the Office of Price Administration, pursuant to authority granted by law as in Paragraph 6 of Plaintiff's complaint set forth, authorized and directed Metals Reserve Company to pay a premium price for ores produced over and above quotas to be fixed jointly by the Office of Price Administration and the War Production Board, said premium prices to be based on 17 cents for copper, eleven cents for zinc and 9 1/4 cents for lead.

2. That Metals Reserve Company on March 7, 1942, issued a statement in which it sets forth that in effecting the program, as outlined, the said Metals Reserve Company would pay a premium on all domestic production of copper, lead and zinc in excess of monthly quotas established by the War Production Board and the Office of Price Administration and approved by Metals Reserve Company which will reflect the difference between the respective ceiling prices for the materials involved and the equivalent of 17c per pound Connecticut Valley for copper, 9 1/4c per pound New York for lead, and 11c per pound East St. Louis [fol. 17] for zinc; that said statement further provided that "following receipt in each month of its agents' and representative's statements, together with the sworn producers'

affidavits, Metals Reserve Company will arrange for the premium payments to be made promptly to the producers". Thereafter, Metals Reserve Company has paid and continues to pay said premium prices for said ores.

3. That as a condition precedent to receiving premium prices from Metals Reserve Company, a producer must file an affidavit to the effect that it has "produced, and delivered" to the smelter the amount of copper, lead and zinc as listed; that its monthly production quota has been filled and "the amount of material specified therein has been produced, and delivered for sale during the month above mentioned."

4. That the premium prices paid by Metals Reserve Company are paid on account of the production and delivery to the smelter or refinery of the over-quota ores and in contemplation of the subsequent sale of said ores for use in the further and more expeditious prosecution of the war.

5. That the amounts received by the Plaintiff herein from Metals Reserve Company on account of the production and delivery to the smelter of all ores sold in the calendar year, 1943, are part of the "gross amount received for or the gross value of metalliferous ore sold" as set forth in Section 80-5-66, Utah Code Annotated, 1943.

6. That at the time Plaintiff herein filed with Defendant, State Tax Commission, the statement required by Section 80-5-67, Utah Code Annotated, 1943, Plaintiff failed to include therein the amount of the premium prices received from Metals Reserve Company on account of the ores sold during the calendar year 1943; that thereafter and pursuant to Subdivision 5 of said Section 80-5-67, the said Defendant, State Tax Commission, requested Plaintiff to file such information, which Plaintiff failed to do but in lieu thereof, and because it was considered to be approximately [fol. 18] the same sum, Plaintiff filed with the State Tax Commission a statement setting forth the amount of premiums paid to it by Metals Reserve Company for ores produced and delivered to the smelter during the year 1943; that thereupon and pursuant to authority granted by Section 80-5-68, Utah Code Annotated, 1943, the Defendant, State Tax Commission, accepted said amount in the sum of \$3,781,421.55 as being the amount received by said Plaintiff from Metals Reserve Company in connection with the ores

sold by Plaintiff during the year 1943; that subsequently and pursuant to Section 80-5-66, the Defendant, State Tax Commission, lawfully levied and assessed an occupation tax in the sum of \$815,443.35 against the Plaintiff herein.

Wherefore, Defendants Pray judgment that the Plaintiff take nothing by reason of its complaint on file herein but that the same be dismissed with costs.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skauchy, Attorney for State Tax Commission, Attorneys for Defendants.

(Duly Verified.)

Received a copy of the Foregoing Answer this 10th day of October, 1944, 5:15 p. m.

C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

AMENDED AFFIRMATIVE DEFENSE—Filed October 18, 1944

Come now the Defendants above named and by leave of the court hereby substitute the attached pages numbered 5 to 9 in lieu of Defendants' affirmative defense contained [fol. 19] on Pages 4, 5 and 6 of Defendants' original answer.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skauchy, Attorney for State Tax Commission, Attorneys for Defendants.

Received a copy of the foregoing amended affirmative defense this 17th day of October, 1944.

C. C. Parsons, Attorneys for Plaintiff.

For further and separate defense, Defendants allege as follows:

1. Section 902e of the Emergency Price Control Act of 1942 which became law on January 30, 1942 (Ch. 26, 56 Stat. 23; 50 U. S. C. App., Sec. 901 et seq.) provides that the administrator whenever he determines that the maximum

necessary production is not being obtained or may not be obtained during the ensuing year may, on behalf of the United States, "buy or sell at public or private sale or store or use, such commodities in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: Provided, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended (Title 15, Sees. 606b, 609j), such determinations shall be made by [fol. 20] the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d (Title 15, Sees. 606b, 609j); except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery.

2. Pursuant to authority granted by Sees. 901 and 902 of said Emergency Price Control Act of 1942, the administrator, on April 28, 1942 (7 F. R. 3153 as amended) issued his general maximum price regulation whereby it was provided that no person shall sell or deliver any commodity at a price higher than the maximum price permitted by the regulation (Section 1499.1). Said regulation further provided that the provisions thereof should not apply to such sales and deliveries of commodities as might be specified by supplementary regulations or amendments thereto (Sec. 1499.9). Said general maximum price regulation became effective.

Thereafter, to-wit, on August 12, 1941, and in furtherance of the objects of said Emergency Price Control Act of 1942, the administrator issued his price schedule No. 15 whereby it was provided that on and after February 1, 1942, no per-

son should sell, offer to sell, deliver or transfer copper and no person should buy, offer to buy or accept delivery of copper at a price higher than twelve cents per pound Connecticut Valley provided "that any person may sell or offer to sell, deliver, or transfer copper to Metals Reserve Company or any other government department, agency, or corporation previously approved in writing by the Office of Price Administration, and Metals Reserve Company, or any other government department, agency or corporation so approved by the Office of Price Administration may buy, offer to buy, or accept delivery of copper at prices higher than the maximum prices set forth".

[fol. 21] Subsequently, the administrator of the Office of Price Administration amended the provisions of the General Maximum Price Regulation and particularly Section 1499.9 whereby it was provided that the general maximum price regulation should not apply to "sales or deliveries of metallic copper, lead or zinc to the Metals Reserve Company, or its duly authorized *agents*, or agents, pursuant to the premium price plan announced by the Federal Loan Agency, the War Production Board, and the Office of Price Administration. This amendment became effective May 18, 1942. (7 F. R. 3724).

3. Pursuant to Title 15, U. S. C., Sec. 606b (being the same as Section 5d of the Reconstruction Finance Corporation Act, as amended, 15 U. S. C., Section 606b, 609j) Metals Reserve Company was incorporated on June 28, 1940. (6 F. R., 2970). The Articles of Incorporation thereof, as amended, set forth the objects, purposes and powers of the corporation to be "to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President". (filed Oct. 3, 1941, 6 F. R. 5464).

4. On January 12, 1942, the Honorable Jesse Jones, as Federal Administrator, pursuant to authority granted under Sec. 5d of the Reconstruction Finance Corporation Act, as amended, announced that Metals Reserve Company would pay a higher price for lead, zinc and copper according to a plan to be announced. The statement further provided that any metals "so acquired by the Metals Reserve Company which are not used for or by the government will be subject to your allocation at the ceiling price fixed by the price administrator".

5. On February 9, 1942, a joint statement was issued by the War Production Board and the Office of Price Administration setting forth certain rules and regulations governing the payment of premium prices for over-quota production of copper, lead and zinc. Said statement provides that in accordance with the plan announced, "Metals Reserve Company has announced that it will pay, for a period of two and one-half years beginning February 1, 1942, and ending [fol. 22] July 31, 1944, premium prices for the production of copper, lead and zinc in excess of quotas to be established jointly by the War Production Board and the Office of Price Administration. These premium prices will be based on 17¢ for copper, 11¢ for zinc and 9 1/4¢ for lead".

6. On March 7, 1942, Metals Reserve Company issued its statement which, as subsequently amended, states that in effecting the program as outlined, the said Metals Reserve Company would pay a premium on all domestic production of copper, lead and zinc in excess of monthly quotas established by the War Production Board and the Office of Price Administration and approved by Metals Reserve Company, which will reflect the difference between respective ceiling prices for the materials involved and the equivalent of 17¢ per pound Connecticut Valley for copper, 9 1/4¢ per pound New York for lead, and 11¢ per pound East St. Louis for zinc. Each producer representing himself as eligible for premium payments must "(1) cause the smelting company to which he ships to be furnished, as agent for Metals Reserve Company, with a sworn producer's affidavit (forms thereof can be obtained by the producer from the smelting company) showing, among other things, the amount of material in excess of quota delivered during the month covered by such affidavit for which he has been paid or will be paid and on which he is eligible for a premium, and (2) cause the smelting company to be furnished with all necessary information so as to enable it to supply Metals Reserve Company with a statement setting out all the data required for the making of the premium payments". Said statement further provides that "following receipt in each month of its agents' and representative's statements, together with a sworn producers' affidavits, Metals Reserve Company will arrange for the premium payments to be made promptly to the producers". Thereafter, Metals Re-

serve Company has paid and continues to pay said premium prices for said ores as in said program set forth.

7. The affidavit of the producer requires the producer to certify that it has "produced and delivered" to the smelter [fol. 23] in company during the particular month the quantities of copper, lead and zinc as listed; that its monthly production quota has been filled and the amount of materials specified therein "has been produced and delivered for sale during the month above mentioned, in addition to the amount of materials in excess of quotas produced and delivered as hereinafter listed."

The premium prices paid by Metals Reserve Company to the Plaintiff herein are paid on account of the production and delivery to the smelter as hereinabove set forth of the ores produced in excess of quota. Thereafter, the allocation of said ores is made in accordance with priority ratings as established by the President of the United States pursuant to powers granted by statute (56 Stat. 177, 50 U. S. C. App., Sec. 633).

8. The amounts received by the Plaintiff herein from Metals Reserve Company on account of the production and delivery to the smelter pursuant to the program above outlined of all ores sold in the calendar year 1943, are part of the "gross amount received for or the gross value of metalliferous ore sold" as set forth in Section 80-5-66, Utah Code Annotated, 1943.

9. At the time Plaintiff herein filed with Defendant, State Tax Commission, the statement required by Section 80-5-67, Utah Code Annotated, 1943, Plaintiff failed to include therein the amount of the premium prices received from Metals Reserve Company on account of the ores sold during the calendar year 1943. Thereafter and pursuant to Subdivision 5 of said Section 80-5-67, the said Defendant, State Tax Commission, requested Plaintiff to file such information. Plaintiff thereupon filed with the State Tax Commission a statement setting forth the amount of premiums paid to it by Metals Reserve Company for ores produced and delivered to the smelter during the year 1943, in the sum of \$3,781,421.55. The Defendant, State Tax Commission, thereafter, lawfully levied and assessed an occupation tax in the sum of \$815,443.35 against the Plaintiff herein.

Wherefore, Defendants Pray judgment that the Plaintiff [fol. 24] take nothing by reason of its complaint on file herein but that the same be dismissed with costs.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanechy, Attorney for State Tax Commission, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON PRETRIAL HEARD
OCTOBER 13, 1944

The Court: What is the issue in this case, gentlemen?

Mr. Parsons: If the Court please, ceiling prices were established for essential metals, essential to the prosecution of the war. The Government found under those ceiling prices the necessary production of essential metals was impossible. Rather than increasing the ceiling prices the Government offered certain subsidies for production of these metals in excess of fixed quotas. In 1943 these subsidies were paid to the plaintiff companies in these two cases. The State Tax Commission then, treating these subsidies as part consideration for sales, applied the mining occupation tax of Utah and taxed those subsidies. The amount of the tax on the subsidies was paid under protest by these companies, and these suits have been instituted to recover back the sums paid.

The two issues involved in the Kennecott Copper case and, so far as I am informed they are the same in your case Mr. Hogan, are these:

First, that the taxation of these subsidy payments is not authorized by Utah law.

Secondly, that this taxation of the subsidies involved was a tax on the very means used by the Federal Government in the prosecution of the war and consequently beyond the [fol. 25] power of the State to make this direct levy upon the Government activities or facilities.

Those are the only two issues in the case.

The Court: Is that a correct statement?

Mr. Nielsen: I think that is a correct statement, your Honor.

The Court: In other words, it is a question of law upon the record?

Mr. Parsons: I would think so. I might say this: counsel have denied quite liberally the allegations of the complaint but I suspect those denials go to our conclusions of law rather than to the facts.

Mr. Nielsen: That is correct, your Honor.

The Court: Can you gentlemen agree upon a record?

Mr. Nielsen: I think we can.

The Court: Setting out what was actually done and with the applicable statute?

Mr. Nielsen: As to what are the applicable statutes, your Honor, the plaintiffs have pleaded certain statutes. The defendant this morning would like to make an amendment to the answer to plead some other statutes or orders which appear in the Federal Register. Whether they are applicable I do not think we can agree.

The Court: I am not asking you to do that. I am asking you if you can put into the record those statutes that either or both of you rely on.

Mr. Parsons: What they are attempting to do is to compile those orders; the statutes of course are available to the Court; the orders may not be, and there are so many of them it is difficult to find them. Our idea is to compile under one cover all the orders applicable to this case.

The Court: What do you mean by orders?

Mr. Parsons: Executive Orders, Presidential orders by authority of the Acts. I think the Court would take judicial notice of those orders.

[fol. 26] The Court: If I only knew what they were.

Mr. Parsons: To assist the Court in that regard I am sure counsel and ourselves can agree upon those orders. We will put them under one cover and submit them in that way.

The Court: Yes, you gentlemen do that when you come in, and copy your statutes too; then we don't have to run to the books.

Mr. Nielsen: In respect to that, the Tax Commission would like to have leave to amend its answer to include therein three additional orders; the first is the Article of Incorporation of Metals Reserves Company which is the

company that pays this premium tax; the second an amendment of the administrator, Office of Price Administration relative to—

The Court: Will it be necessary for you to rewrite your answer?

Mr. Nielsen: No, I don't think so; the affirmative defense part of it, because they come in chronological order, it would be necessary to re-write that.

The Court: No reason why they should not be permitted to put those in the pleading?

Mr. Parsons: I have no objection.

The Court: You can attach it or rewrite that page if you want to.

Mr. Nielsen: We probably would re-write it.

The Court: Re-write it and I will let you substitute it.

Mr. Parsons: That is all right. When can you do this?

Mr. Nielsen: We would like to have until Tuesday if we may serve it on you then.

The Court: When is it set for?

Mr. Nielsen: The 19th.

Mr. Parsons: Can't you get it in Saturday? Only a question of typing; you have it all done haven't you?

[fol. 27] Mr. Nielsen: I hope I have. I think we might get it done tomorrow; I don't know for sure.

The Court: You can get it served on the other side by Monday anyway?

Mr. Nielsen: Yes.

The Court: You get your amendment in by Monday the 16th, then on the 19th when it comes up it will be a question of argument on what the law is.

Mr. Parsons: I think so.

The Court: These two cases are consolidated for trial?

Mr. Parsons: They are consolidated for trial.

Certificate

I certify that the within pages numbered from 1 to 5, inclusive, contain a full, true and correct transcript of my shorthand notes of the proceedings on pretrial in the within entitled causes.

E. M. Garnett, Official Reporter.

Filed: Feb. 20, 1943.

IN UNITED STATES DISTRICT COURT

PRETRIAL ORDER—Filed Oct. 21, 1944

This cause coming on for pretrial on the 13th day of October, 1944, Mr. C. C. Parsons appearing for the plaintiff, and Mr. A. H. Nielsen and Mr. L. W. Skauchy for the defendants,

Now, therefore, upon the statements of counsel for the respective parties as to the issues of law and of fact to be tried, the following summary of said issues is hereby made and ordered filed herein, to-wit:

The issues of law to be determined upon the record are:

(1) Whether or not the taxation of the subsidy payments herein is authorized by Utah law.

(2) Whether or not the taxation of the subsidies herein is a taxation of means used by the Federal Government in [fol. 28] the prosecution of the war and consequently beyond the powers of the State to make this direct levy upon Government activities or facilities.

Tillman D. Johnson, United States District Judge.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—October 27, 1944

On this 27th day of October, 1944, plaintiff, Kennecott Copper Company, appearing by C. C. Parsons, its attorney, and plaintiff Silver King Coalition by R. J. Hogan, its attorney, and defendants by A. H. Nielsen and W. L. Skauchy, its attorneys, and these two cases having been consolidated, came on for trial. The following jury was called, to wit: Stanley L. Day, M. C. Seeley, Allen H. Barber, Vesta Cahoon, Lawrence B. Johnson, David Beesley, Reuben H. Hansen, Lottie M. Ferguson, Mark Eggerston, F. L. Fountain, Wesley M. Lundstrom and Russell B. Waldron, twelve good and lawful persons, and they were duly empaneled and sworn to well and truly try this case and a true verdict render according to the evidence. Certain stipulations were made in open court. The jury were duly cautioned as to their duties during the recess and permitted to separate to meet the court at ten a.m. on October 30th.

The case was then submitted on stipulations. Both sides rest. Each side moved for a directed verdict in its favor in each case, and the Court heard the arguments of counsel until the hour of adjournment, and the further trial of this case was continued until 9:00 A. M. on October 30, 1944.

IN UNITED STATES DISTRICT COURT

JUDGMENT

This action having come on regularly for trial beginning October 27, 1944, with plaintiff appearing by C. C. Parsons, its attorney, and defendants by A. H. Nielsen and L. W. Skanchy, its attorneys, and this case was consolidated for purpose of trial with Civil 680, Silver King Coalition Mines Company v. State Tax Commission, et al, and a jury of twelve good and lawful persons was duly empaneled and [fol. 29] sworn to well and truly try this case and a true verdict render according to the evidence. The Jury were excused from the box, and the case was submitted on stipulation. Each side moved for a directed verdict in its favor, and the Court heard the arguments of counsel on said motions, and on October 30th, the jurors resumed their places in the jury box, and were instructed by the Court to return the following verdict in this case:

"We the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the plaintiff and against the defendants, in the sum of \$37,814.22 with interest from May 31, 1944, at 6% per annum, by direction of the Court.

Dated: October 30, 1944. Frank Fountain, Foreman."

Wherefore, it is ordered and adjudged by the Court on this 30th day of October, 1944, that Kennecott Copper Corporation, a corporation, recover of and from defendant, State Tax Commission, et al., the sum of \$37,814.22 with interest from May 31, 1944, at 6% per annum together with its costs herein incurred to be taxed upon a verified cost bill and have execution therefor.

Attest: W. B. Wilson, Clerk.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Jan. 26, 1945

To the above named Plaintiff, Kennecott Copper Corporation, a corporation, and to C. C. Parsons, Wm. M. McCrea and A. D. Moffat, its attorneys:

Notice is hereby given that the defendants above named hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment entered by the above entitled court on the 30th day of October, 1944, in accordance with a directed verdict of the jury, in favor of the Plaintiff and against the Defendants in the [fol.30] sum of \$37,814.22 with interest from May 31st, 1944 at 6% per annum.

Dated this 26th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

STIPULATION, DISPENSING WITH BOND—Filed Jan. 27, 1945

It is hereby stipulated by and between the parties hereto through their respective attorneys of record that the bond on appeal, or any other bond herein required of the Defendants in connection with their appeal to the United States Circuit Court of Appeals for the Tenth Circuit may be dispensed with and the Defendants, and each of them, are hereby relieved from the necessity of filing any such bond.

Dated this 27th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants. C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

[fol. 31] IN UNITED STATES DISTRICT COURT

STIPULATION DESIGNATING RECORD ON APPEAL—Filed
January 27, 1945

It is hereby stipulated by and between the parties hereto through their respective attorneys of record that for inclusion in the transcript of the record on Defendants' appeal herein, the Clerk of this Court shall transmit under his hand and the seal of the Court of the United States Circuit Court of Appeals for the Tenth Circuit the following documents which will then constitute and present the complete record and all of the proceedings and evidence in this action:

1. Complaint.
 2. Motion of Defendants to dismiss.
 3. Minute Entry of September 26th denying Defendants' Motion to Dismiss.
 4. Answer of Defendants.
 5. Reporter's transcript of proceedings on Pre-trial held October 13, 1944.
 6. Amendment to Defendants' Answer pursuant to permission granted in open court.
 7. Order on Pre-trial dated October 21, 1944.
 8. Minute Entry of October 27, 1944.
 9. Plaintiff's Exhibits 1 and 2 constituting the Stipulation of Facts and the pertinent statutes and orders and announcements of the various federal agencies, or Reporter's transcript thereof.
 10. Judgment of the court in accordance with the directed verdict of the jury in favor of the Plaintiff and against the Defendants, dated October 30, 1944.
 11. Reporter's Transcript of oral decision rendered October 30, 1944.
 12. Notice of Appeal with date of filing.
 13. Stipulation Dispensing with Bond.
 14. Designation of and stipulation as to the record.
- [fol. 32] 15. Statement of Points Relied on.
16. Clerk's certificate.

Dated this 27th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants; C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

STATEMENTS OF POINTS UPON WHICH APPELLANTS INTEND TO
RELY—Filed February 21, 1945

To the Above Named Plaintiff, Kennecott Copper Corporation, a Corporation and to C. C. Parsons, Wm. M. McCrea, and A. D. Moffat, Its Attorneys:

You are hereby notified that the defendants and each of them intend to rely upon the following points in connection with their appeal from the judgment entered by the above entitled court on the 30th day of October, 1944.

(1) Error of the court in refusing to grant defendants' Motion to Dismiss the Action, upon the grounds as stated in said Motion.

(2) Error of the court in denying defendants' Motion for a Directed Verdict in said cause on the evidence and facts presented to the court by the parties.

(3) Error of the court in granting plaintiff's Motion for [fol. 33] a Directed Verdict on the evidence and facts presented to the court by the parties.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanechy, Attorney for State Tax Commission, Attorneys for Defendants.

Received a copy of the foregoing this 21st day of February, 1945.

C. C. Parsons, Wm. M. McCrea, A. D. Moffat, Attorneys for Plaintiff.

Clerk's Certificate to foregoing transcript omitted in printing.

Reporter's Transcript**Appearances:**

Mr. C. C. Parsons, Attorney for Plaintiff; Mr. A. H. Nielsen, Mr. L. W. Skanchy, Attorneys for Defendants.

Salt Lake City, Utah,
October 27, 1944.

Before Honorable Tillman D. Johnson, Judge, and a Jury

(A jury of twelve good and lawful persons was called, examined, chosen and sworn herein.)

The Court: Are you gentlemen submitting this case on a stipulation of some sort?

Mr. Parsons: Yes, your Honor.

The Court: Would you read the stipulation.

Mr. Parsons: The stipulation is quite lengthy; I presume it would take an hour to read it. May I suggest it be introduced in evidence and in the course of our argument we will refer to the facts that are relevant here.

The Court: Well, if you gentlemen will stand up here and agree, and one supplement the other, I would just as soon you would state it as read it.

Mr. Nielsen: State it as we go along, yes.

The Court: Go ahead and summarize it then.

Mr. Parsons: This stipulation of facts was made in the course of the protest by the mining companies to the State Tax Commission when the State Tax Commission undertook to apply the net proceeds tax statute and occupation tax statute to these subsidy or premium payments. It reviews the manner of operation of the mining company, the establishment of the quotas beyond which this excess production earns the premium or subsidy payment. It describes also the procedure of the Government in the making of these subsidy payments.

The Court: Was that a regulation or a statute?

Mr. Parsons: Both. The authority comes from the statute [fol. 35] and the regulation was pursuant to that statutory authority.

I think that generally relates the contents of this stipulation.

The thought we had in mind was we would have the stipulation identified as an exhibit and offer it and then it becomes part of the record. And as a second exhibit we would offer the compilation of statutes, directives, pronouncements, that in any possible way could have some relevancy to the issues involved here,—that for the convenience of the Court. The matters stated in that compilation are matters of which the Court would take judicial notice. That would complete our record. Then all the parties would rest; we would make a motion for directed verdict and proceed to argue the case on that motion.

The Court: All right, let them be marked and filed.

Mr. Nielsen: That is agreeable.

(Exhibit 1 was thereupon marked by the reporter).

Mr. Parsons: The stipulation of facts to which I have referred has now been identified as Exhibit 1. This we offer as the facts—constituting the record of the facts in the two cases here consolidated for trial.

The Court: It may be received.

(Said Exhibit 1 offered and received in evidence is attached to the original of this transcript, and a copy of same as furnished by counsel is attached to the copy of this transcript filed herein.)

(Exhibit 2 marked by the reporter.)

Mr. Parsons: The compilation of statutes, executive orders and directives and official pronouncements to which I have also referred is now identified as Exhibit No. 2. This we offer for the convenience of the Court.

The Court: It may be received for that purpose.

(Said Exhibit 2 offered and received is attached to the original of this transcript, and a copy of same as furnished by counsel is attached to the copy of this transcript filed herein.)

[fol. 36] Mr. Parsons: The plaintiff Kennecott Copper Corporation rests.

Mr. Hogan: The Silver King Coalition Mines Company rests.

The Court: Both sides rest?

Mr. Nielsen: Both sides rest.

The Court: Make your motions then and put them in the record.

Mr. Parsons: The plaintiff in the case of Kennecott Copper Corporation against the State Tax Commission and others, Civil No. 671, moves the Court for an order directing the jury to return verdict for the plaintiff on the following grounds:

(1) It is conclusively established by the uncontradicted evidence that the deduction of the subsidy payments herein involved and here complained of was not authorized by Utah law.

(2) It is conclusively established by the uncontradicted evidence that the deduction of the subsidies herein is a deduction of the very means employed by the Federal Government to successfully prosecute the war and is beyond the power of either the statute or of these defendants to make this direct levy upon the activities or instrumentalities of the Federal Government.

The Court: You make that in behalf of both?

Mr. Hogan: The Silver King Coalition Mines Company in Civil No. 680 concurs in the motion.

The Court: You join in the making of the same motion in behalf of your client?

Mr. Hogan: That is right.

Mr. Nielsen: At this time the defendant feels that it also should make a motion for directed verdict in this matter upon the grounds:

(1) That which was alleged in their motion to dismiss, that the court has no jurisdiction of this matter, and [fol. 37] (2) Upon the ground that the evidence before the Court conclusively shows that the tax here in question was validly assessed by the State Tax Commission. The evidence does not support the complaint and claims of the plaintiff in each case.

The Court: That is in both complaints,—both suits?

Mr. Nielsen: Yes, if your Honor please.

The Court: Ladies and gentlemen of the jury, there is no use in keeping you here to listen to the argument unless you want to stay; so while you are out of the court room do not talk about this case or let anybody talk to you about it, and do not form or express any opinion as to the merits of it.

You can be excused until Monday morning at 10 o'clock.

The Court: I will listen to you gentlemen in any order of the argument you want to agree upon.

Mr. Parsons: I presume the burden is upon the plaintiff and I should proceed.

The Court: It would be on your motion, yes.

(Whereupon motions for a directed verdict were argued by counsel for the respective parties), and the further hearing of said cause was adjourned to 9 A. M. Monday, October 30, 1944)

REPORTER'S TRANSCRIPT OF ORAL DECISION OCTOBER 30, 1944

The Court: The decision of these cases depends upon the meaning and fair interpretation of the State and the United States statutes applicable to the situation.

These various statutes have been read and re-read during the progress of this discussion, and I will not have them re-read at this time, but they may be considered incorporated in the remarks that I shall make respecting the cases.

In this connection I will say that a taxing body, such as the Utah State Tax Commission, is charged with the duty of collecting all taxes that may be properly assessed and [fol. 38] collected under the laws of the State, and it becomes its duty as such to solve powers that are doubtful in favor of the State. That is the universal practice, so far as I have observed, of all taxing bodies, including the revenue department of the United States. So that it results in many cases an appeal must be made to the courts to determine what is the proper meaning and construction of the statutes under which taxes have been levied and assessed. That is the case here.

The State statute provides for the collection of an occupation tax on the gross sales or value of the metals produced by mining companies, and so in these cases the State Tax Commission has proceeded to levy assessments upon the gross amounts which it claims has been paid to or received by the respective mining companies covering the period involved, and which assessments have been paid under protest by plaintiff companies.

The tax or levy in these cases has this anomaly: for the bulk of the metal values produced it is agreed, using copper as an illustration, that it has a valuation or sales

price of twelve cents a pound—the relative proportion of these two prices I am unable to state offhand—but for that which was produced in excess of this twelve cents per pound price they are here claiming a price of seventeen cents, resulting from a payment made, not by the purchasers of the metals in question, but by the United States Government.

I just asked counsel for the State Tax Commission whether that extra, additional payment was made for the benefit of the purchasers of these metals, or for the benefit of the seller of the metals. Not holding him to his answer, I am, however, of the opinion that he answered correctly when he said it was for the benefit of the sellers, that is to say, of the plaintiffs in these actions.

So that we have this question submitted for determination: Was that extra five cents per pound for this additional production any part of the purchase price or the sales price of these metals?

Certainly, so far as the relation between the purchaser and the seller or the Government is concerned, it constituted no bargain contract price, or part of the price. Then what was it?

To that I think we must look to the statutes of the United States. The State of Utah, neither by its Legislature nor by its Tax Commission, can say what the United States Government shall do with its own money. That is a matter that must be determined by Congress, and its determination of that question is final and conclusive upon all the courts of the nation, State and National.

Now what was the purpose of Congress in enacting this sort of legislation providing for the payment of this particular subsidy?

The Statute itself does not recite, but it does contain the word "subsidy", and subsidy, speaking generally, is something, usually money, donated or given or appropriated by the Government through its proper agencies,—in this country by the Congress. Congress may, and has as here, in these wartimes used many sub-agencies of the Executive Department to carry out the laws enacted by it.

Now, what did Congress mean and intend when it authorized the payment of subsidies under the conditions specified in the Act? Was it appropriated for the purpose of relieving the buyers of the products or metals indicated

from the payment of the market value of the metals in question?

In that connection we must bear in mind that Congress has authorized the Price Control Administrator to make and fix ceiling prices on practically all articles in use in this country. In these cases the Administrator fixed prices at which these metals could be sold, copper for instance, at twelve cents a pound. Now these prices, whatever they may be in any particular case, we must presume were based upon a fair consideration of what would be a fair and just price to be received and paid for the article in question. Can we say that the fixing of the price of copper was a mere subterfuge on the part of the Administrator, and that the real price that he should have fixed, if he had been honest about it, was seventeen cents? Such a construction given to his acts would be to question his honesty, it seems to me. [fol. 40] Twelve cents per pound for copper when it was fixed we must accept as the fair market value to be paid for this metal and to be received by the producer of it, and with respect to the bulk of the production in these cases the producer did not receive and the purchaser did pay that price. Now the Government, for its own reasons, and without consulting the Legislature of the State of Utah or its Tax Commission, made these extra and additional payments, and the Congress called it a subsidy, which by its very terms means a gift from the Government to these producers. True when it is paid, it is money received and used by the producers, like they use any other money, and it might very well be that in the determination of income the courts, in the construction of an income statute or the Congress in making such payment, may be held to have intended that the States, or the Government itself, should include that payment in the amount upon which income taxes should be assessed. But this is not an income tax. This is an occupation tax upon the gross sales of these metals by these producers, and who are paid money as a subsidy by the United States.

It is recited and reiterated by some of the Government representatives who have written about this matter, that these payments were made to meet the additional cost and expense that would be incurred by producers in making this extra effort to add to its product. Well, I am inclined to the view that these gentlemen were entirely right in that

construction of the statute as to the purpose which Congress had in authorizing these subsidy payments.

In my view of the situation it would be, and is, a strained construction to make these payments, although based upon five cents, or some other amount, per pound for the metal in question, a part of the purchase price so as to bring it within the terms and meaning of the State statute under which the Tax Commission in these cases has acted.

In that connection, however, I want to repeat that I have no criticism to make of the Tax Commission in raising this question. It is the duty of the Tax Commission to collect all the taxes that are authorized under the State statute, and if it had any doubt about it, it solved it by levying this tax, and with these resulting law suits. But I am very [fol. 41] clearly of the opinion that neither the State statute nor the Federal statutes give the Tax Commission any authority whatever to make these levies and collections.

You may call the jury into the box.

(Jury called in.)

The Court: Will you prepare a form of verdict Mr. Clerk.

I will state to the jury that the court, after listening to the argument of counsel and being as fully advised as may be, is of the opinion that the plaintiffs in these actions are entitled to judgment as prayed for:

What is the Amount you are suing for?

Mr. Parsons: Ours is \$37,000 some odd dollars.

Mr. Hogan: Ours is \$4533.54.

The Clerk: Insert that in the verdict?

The Court: Write it in the verdict.

The Clerk: The Copper Company's is what?

Mr. Parsons: \$37,814.22, with interest from the date of payment.

The Court: I do not know whether you are entitled to interest or not. I doubt very much that you are entitled to interest.

Mr. Parsons: Your Honor has given it to us in the past.

Mr. Hogan: I think the statute provides for it,—the State Statute.

The Court: If it provides for it. Interest from what?

Mr. Parsons: From the date of payment.

The Court: Is that right?

Mr. Nielsen: That is correct, your Honor.

The Court: Do you want them to figure out the interest, or write it in: with interest from—

Mr. Parsons: I would just write it in, with interest from the date at six per cent per annum.

[fol. 42]. The Court: In the old days that form of verdict has been criticised, where you leave it to the clerk to count interest instead of the jury. Can you not count the interest shortly? It imposes a duty on the clerk he should not be required to perform.

Mr. Parsons: With interest from the date of payment; I will have to give you that date.

The Court: Amounting to what sum?

Mr. Parsons: Together with interest thereon at the rate of six per cent per annum from the 31st day of May, 1944.

The Clerk: May 31st, 1944, at six per cent?

Mr. Parsons: At six per cent per annum.

The Clerk: By the direction of the Court.

Mr. Parsons: Do you want to check the amount? \$37,814.22.

Mr. Hogan: Ours is \$4,533.54, interest from July 29, 1944.

The Court: Are these forms now satisfactory to counsel?

Mr. Hogan: Yes, your honor.

The Court: One of your number will sign the verdict, at the direction of the court, finding for the plaintiffs in the amounts indicated in the verdicts.

Read the verdicts.

(Verdicts read by the Clerk.)

The Court: You may be excused, and take your places in the lobby of the court room.

Certificate

I certify that the within pages numbered from 1 to 7 inclusive, contain a true and correct transcript of my shorthand notes of the oral decision of the Court herein, as approved by the Court for release under the Rule.

E. M. Gannett, Official Reporter.

Filed in United States District Court, District of Utah, Feb. 20, 1945. V. P. Ahlstrom, Clerk. By J. Reed Stewart, Deputy.

[fol. 43]

Certificate

I certify that the within pages numbered from 1 to 16 inclusive, contain a full, true and correct transcript of my shorthand notes of the proceedings therein recorded in the within entitled cause.

E. M. Gannett, Official Reporter.

Dated at Salt Lake City, February 21, 1945.

EXHIBIT No. 1

Stipulation of Facts

Before the State Tax Commission of the State of Utah

In the Matter of the Mine Occupation Tax assessed by the State Tax Commission of Utah against the Mining Companies hereinafter named and becoming due and payable on or before the 1st day of June, 1944; and

In the Matter of the Assessment by the State Tax Commission of the Metalliferous Mines and Mining Claims of said Mining Companies for the year 1944.

The State Tax Commission of Utah, hereinafter called "Commission" and the several Mining Companies that have caused this Stipulation to be executed, as indicated below, hereinafter called "Mining Companies" hereby stipulate and agree as follows:

1. That the Commission, purporting to be acting under the provisions of Sections 80-5-66 and 80-5-72, Utah Code Annotated, 1943, has notified said Mining Companies that their respective Mine Occupation Taxes, due June 1, 1944, have been fixed by said Commission and of the amount thereof.

2. That in fixing the amount of said Occupation Taxes said Commission has included as part of the "gross amount received for, or the gross value of metalliferous ore sold" during the year 1943, the amounts received by said Mining Companies, respectively, from Metals Reserve Company as premiums on account of the production of ores by said Mining Companies in excess of quotas established jointly by [fol. 44] the War Production Board and Office of Price

Administration, approved by said Metals Reserve Company and allotted to said Mining Companies, respectively.

3. That each of said Mining Companies, within the time allowed by law, applied to said Commission by written Petition for a hearing and correction of the amount of the tax so assessed against it, and in each such Petition there were set forth the reasons why such hearing should be granted and the amount by which such tax should be reduced.

4. That said Commission has also notified said Mining Companies that the Net Proceeds Valuation of their mining properties for the year 1944, has been arrived at by including in "Net Annual Proceeds" the amounts received by said Mining Companies from Metals Reserve Company as premiums on account of such over-quota production of ores.

5. That each of said Mining Companies likewise, within the time allowed by law, filed with said Commission written objections to the assessment so made, protesting the inclusion of such premium payments in computing net proceeds and asking for a hearing before the Commission, and that the assessment of its mining properties be reduced by excluding from the Net Proceeds Valuation thereof the aggregate amount of premium payments received by such Company.

6. The issues before the Commission are:

(a) Whether, in fixing the Mine Occupation Tax payable by said Companies, respectively, premium payments received from Metals Reserve Company during the year 1943 are properly includable as part of the "gross amount received for, or the gross value of metalliferous ore sold" during said year.

(b) Whether, in computing Net Annual Proceeds for the purpose of assessing the mining properties of said Companies for the year 1944, such premium payments received by them during the year 1943 are properly includable as part of the "gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent of all ores from such mine or mining claim * * *".

[fol. 45] 7. Executive Order No. 8734 of the President, promulgated April 11, 1941, as amended by Executive Order

No. 8875 of the President, promulgated August 28, 1941, reads in part (and so far as material here) as follows:

“(Purposes)”

“By virtue of the authority vested in me by the Constitution and the statutes, and in order to define further the functions and duties of the Office for Emergency Management with respect to the national emergency as declared by the President on September 8, 1939, for the purposes of avoiding profiteering and unwarranted price rises, and of facilitating an adequate supply and the equitable distribution of materials and commodities for civilian use, and finding that the stabilization of prices is in the interest of national defense and that this Order is necessary to increase the efficiency of the defense program, it is hereby ordered:

(Administrator)

“1. There shall be in the Office for Emergency Management of the Executive Office of the President an Office of Price Administration, at the head of which shall be an administrator appointed by the President. The Administrator shall receive compensation at such rate as the President shall determine and, in addition, shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties.

(Powers)

“2. Subject to such policies, regulations, and directions as the President may from time to time prescribe, and with such advice and assistance as may be necessary from the other departments and agencies of the Federal Government, and utilizing the services and facilities of such other departments and agencies to the fullest extent compatible with efficiency, the Administrator shall:

(Price Control)

“a. Take all lawful steps necessary or appropriate in order (1) to prevent price spiraling, rising costs of living, profiteering, and inflation resulting from market conditions [fol. 46] caused by the diversion of large segments of the Nation's resources to the defense program, by interruptions to normal sources of supply, or by other influences growing out of the emergency; (2) to prevent speculative

accumulation, withholding, and hoarding of materials and commodities; (3) to stimulate provision of the necessary supply of materials and commodities required for civilian use, in such manner as not to conflict with the requirements of the War, Navy and other departments and agencies of the Government, and of foreign governments, for materials, articles, and equipment needed for defense (such requirements are hereinafter referred to as 'military defense needs'); and (4) after the satisfaction of military defense needs to provide, through the determination of policies and the formulation of plans and programs, for the equitable distribution of the residual supply of such materials and commodities among competing civilian demands.

(Investigation)

"b. Make studies of the Nation's civilian requirements for materials and commodities, the supply of goods and services, the status and trend of prices and factors thereof, and the impact of the defense program upon civilian living standards; exercise the powers of the President in requesting such studies pursuant to Section 336(a) of Title III of the Tariff Act of 1930 (Title 19, U. S. C., Sec. 1336(a)); and conduct such investigations, hold such hearings, and obtain such reports as may be necessary or desirable to carry out this Order.

(Prices)

"c. Determine and publish, after proper investigation such maximum prices, commissions, margins, fees, charges, or other elements of cost or price of materials or commodities, as the Administrator may from time to time deem fair and reasonable; and take all lawful and appropriate steps to facilitate their observance."

(Exercise President's Powers)

"4. Perform the functions and exercise the authority vested in the President by the following named Acts, in so [fol. 47] far as and only to the extent that the authority conferred by such Acts will, in the opinion of the Administrator, enable him to carry out and secure compliance with the provisions of Section 2a and 2c of this Order: Section 713(a)-7 of Title 15, U. S. C., Supp. V; Section 4 of the Act

approved June 7, 1939 (Title 50, U. S. C., Supp. V., Sec. 98c); and Section 5 of the Reconstruction Finance Corporation Act, as amended by the Act approved June 25, 1940 (Public No. 664, 76th Congress); subject to the disapproval by the Secretary of War or the Secretary of the Navy of each proposed action thereunder.

8. On August 12, 1941, Price Schedule No. 15 was issued by the Administrator of the Office of Price Administration, and so far as material here, reads as follows:

"Copper

(Text of Schedule)

"The Office of Price Administration is charged with the maintenance of price stability and the prevention of undue price rises and price dislocation. Copper is a basic material for the production of many defense products and as such has been subjected to a method of complete control of its distribution by a General Preference Order of the Office of Production Management, No. M-9-a, effective August 2, 1941. In order to equalize the price to all consumers under that preference order and in the interest of national defense and of the public, the establishment of maximum prices for copper is necessary. On the basis of information furnished by the Trade and secured by independent investigation by Office of Price Administration, I find that the maximum prices set forth below constitute reasonable limitations on the price of copper.

"Therefore, under the authority vested in me by Executive Order 8734, it is hereby directed that:

"Maximum prices for copper. (a) On and after February 1, 1942, regardless of the terms of any contract of sale or purchase, or other commitment, except as provided in Section 1309.53 of this chapter, no person shall sell, offer to sell, deliver or transfer copper and no person shall buy, [fol. 48] offer to buy, or accept delivery of copper at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as Section 1309.60: Provided, that any person may sell, offer to sell, deliver or transfer copper to Metals Reserve Company or any other government department, agency or corporation previously approved in writing by the Office of Price Administration, and

Metals Reserve Company or any other government department, agency or corporation so approved by the Office of Price Administration may buy, offer to buy, or accept delivery of copper at prices higher than the maximum prices set forth in Section 1309.60."

"Less than maximum prices. Lower prices than those set forth in Section 1906.60 may be charged, demanded, paid or offered."

"Evasion. The price limitations set forth in Price Schedule No. 15 shall not be evaded whether by direct or indirect methods in connection with a purchase, sale, delivery, or transfer of copper, alone or in conjunction with any other material, or by way of any commission, service, transportation, or other charge or discount, premium, or other privilege, or by tying agreement or other trade understanding or otherwise.

"Records and reports. Every person making purchases or sales of copper after August 12, 1941, shall keep for inspection by the Office of Price Administration for a period of not less than one year complete and accurate records of: (a) each such purchase or sale, showing the date thereof, the name and address of the buyer and the seller, the price paid or received, and the quantity in pounds or tons of each kind or grade purchased or sold; and (b) the quantity in pounds or tons, of copper (i) on hand, and (ii) on order, as of the close of each calendar month. Persons affected by Price Schedule No. 15 shall submit such reports to the Office of Price Administration as it may, from time to time, require."

Appendix A to said Price Schedule No. 15, so far as material here, reads as follows:

[fol. 49] "Appendix A. Maximum prices. (a) Maximum base price for copper except casting copper. The maximum base price for copper delivered in carload lots at Connecticut Valley points shall be 12 cents per pound. This maximum base price is for electrolytic, lake or other fire refined copper in the shape of wire bars or ingot bars made to meet either the American Society of Testing Materials Stand-

ard specifications, B5-27 for electrolytic or B4-27 for lake copper. ((a) as amended July 27, 1942.)

“(b) Maximum base prices for casting copper.

Amount of Shipment	Price (f.o.b. shipping point)
20,000 pounds or more	11 ³ / ₄ c per pound
Less than 20,000 pounds	12c per pound

“These maximum base prices are for casting copper in the shape of ingot bars or small ingots made by fire refining to a standard of 99.5 per cent pure including silver as copper.

“(b), as amended April 16, 1942)

“(c) Differentials for copper of other kinds or grades or in other shapes or forms. For copper of any other kind or grade or in any other shape or form than that set forth in paragraph (a) or (b) of this section, the maximum price shall be the applicable maximum base price set forth in paragraph (a) or (b) of this section plus or minus the premium or discount for copper of such kind or grade, or in such shape or form which would customarily have been added to or subtracted from the base price on August 11, 1941.

“(d) Differentials for delivery of copper in carload lots at points other than Connecticut Valley points. For copper, except casting copper, delivered in carload lots at any point other than a Connecticut Valley point the maximum price shall be the maximum base price set forth in subsection (a) of this section, as adjusted pursuant to paragraph (c) of this section, plus or minus the delivery differential which on August 11, 1941, would customarily have been added to or subtracted from the base price.”

[fol. 50] 9. On January 13, 1942, the Administrator issued Price Schedule No. 69 which, so far as material here, reads as follows:

“Primary Lead

(Text of Schedule)

“The Office of Price Administration is charged with the maintenance of price stability and the prevention of undue price rises and price dislocations.

"Military and essential civilian demands upon the supply of lead have become increasingly heavy. The present supply of lead will not suffice to meet these needs, and imports are threatened. The combination of increased demand and insufficient supply threatens a bidding up of the price of lead, which will materially increase the cost of the war effort and tend to create an inflationary price spiral.

"Such specifications and standards as are used in this regulation were, prior to such use, in general use in the trade or industry affected.

"Accordingly, under the authority vested in me by Executive Order No. 8734, it is hereby directed that:

"Maximum prices for primary lead. On and after January 15, 1942, regardless of the terms of any contract of sale or purchase, or other commitment, no person shall sell, offer to sell, deliver or transfer primary lead, and no person shall buy, offer to buy, or accept delivery of primary lead in the course of trade or business at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as Section 1355.9; Provided, That any person may sell, offer to sell, deliver or transfer primary lead to the Metals Reserve Company or any other government department, agency, or corporation previously approved in writing by the Office of Price Administration, and Metals Reserve Company or any other government department, agency or corporation so approved by the Office of Price Administration, may buy, offer to buy, or accept delivery of primary lead without regard to the provisions of Revised Price Schedule No. 69. (1355.1 as amended September 4, 1943, effective September 10, 1943, OPA-3047.)"

[fol. 51] Said Schedule contained in addition, provisions identical with those of Price Schedule No. 15 respecting acceptance of lower prices; evasion of price limitations; and making and keeping of records and reports.

Appendix A to said Price Schedule No. 69 fixed the maximum price for common lead at 6½¢ per pound.

10. On January 28, 1942 the Administrator issued Price

Schedule No. 81 which, so far as material here, reads as follows:

“Primary Slab Zinc ;

(Text of Schedule)

“The Office of Price Administration, being charged with the maintenance of price stability and the prevention of undue price rises and price dislocations, has determined that the establishment of maximum prices for primary slab zinc is essential in order to accomplish these purposes and is in the interest of national defense and the national welfare.

“The present supply of zinc does not suffice to meet both military and essential civilian needs. The combination of increased demand and insufficient supply threatens the stability of the price of zinc, any increase in which is reflected in the cost of the war effort and tends to contribute to an inflationary spiral. Primary producers, recognizing the importance of these factors to the national welfare, have cooperated with the Office of Price Administration in preventing increases in slab zinc prices charged by them. However, because of the stringency of the supply situation, zinc sales have taken place during recent months at prices considerably in excess of those approved by the Office of Price Administration.

“After careful investigation and consultation, it has been determined that the maximum prices set forth herein are fair and reasonable.

“Accordingly, under the authority vested in me by Executive Order No. 8734, it is hereby directed that:

“Maximum prices on sales of primary slab zinc. On and after January 29, 1942, regardless of the terms of any contract of sale or purchase, or other commitment, no person shall sell, offer to sell, deliver or transfer primary slab zinc, and no person shall buy, offer to buy, or accept delivery of primary slab zinc in the course of trade or business, at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as Section 1203.59: Provided, That any person may sell, offer to sell, deliver or transfer primary slab zinc to the Metals Reserve Company or any other government department, agency or corporation approved in writing by the Office of Price Ad-

ministration and Metals Reserve Company or any other government department, agency or corporation so approved by the Office of Price Administration, may buy, offer to buy, or accept delivery of primary slab zinc without regard to the provisions of Revised Price Schedule No. 81, (1306.51 as amended September 4, 1943, effective September 10, 1943.)"

Said Schedule contained in addition, provisions identical with those of Price Schedule No. 15 respecting acceptance of lower prices; evasion of price limitations; and making and keeping of records and reports.

Appendix A to said Price Schedule No. 81 fixed the maximum price for primary slab zinc (prime Western) at 8.25¢ per pound.

11. Metals Reserve Company is a corporation duly created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended, and is an agency of the United States Government.

12. On February 9, 1942 a joint statement was issued by War Production Board and Office of Price Administration (P.M.2458) setting forth the rules and regulations governing payment of premium prices for over-quota production of copper, lead and zinc. Said joint statement, so far as material here, read as follows:

"Joint Statement" WPB-OPA

Premium Price Plan for Copper, Lead and Zinc

"The expansion of the armament program following the entry of the United States into the war has made it imperative that unusual steps be taken to increase further the output of copper, lead and zinc because of their prime importance in the production of armaments."

"The premium price plan has been established to make it possible quickly to increase production by mining low grade submarginal ores, and to develop additional ore reserves."

"Particular attention is called to the fact that premium prices will apply to all over-quota production after Feb-

ruary 1, 1942, regardless of the time when tonnage quotas are announced and actual payments begin. By continuing meanwhile to ship through ordinary channels producers will be assured premium prices for over-quota production."

"The principal rules and regulations are as follows:

"1. The premium price plan is one of the steps taken to increase production. In accordance with this plan, the Metals Reserve Company has announced that it will pay, for a period of 2½ years beginning February 1, 1942, and ending July 31, 1944, premium prices for the production of copper, lead and zinc in excess of quotas to be established jointly by WPB and OPA. These premium prices will be based on 17 cents for copper, 11 cents for zinc and 9½ cents for lead.

"2. The premium price plan went into operation February 1, 1942. Regardless of the time at which tonnage quotas are announced and regardless of the time at which actual payments under the plan begin, premium payments shall be made for all over-quota production in February and subsequent months.

"3. A joint committee from the War Production Board and the Office of Price Administration shall fix initial quotas.

"4. Quotas shall be established for particular mines or groups of mines herein referred to as a 'property', and shall be expressed in terms of a property's monthly rate of production. A property's production shall be included in determining its quota and over-quota production regardless [fol. 54] of whether that product is converted into metals, metal oxides or other products.

"5. There shall be five distinct classes of quotas:

- (A) Zero quotas.
- (B) Intermediate.
- (C) 100% quotas.
- (D) Special quotas between zero and 100%.
- (E) Special quotas in excess of 100%.

(A) Zero Quotas.

Any property which had (1) no production or (2) production during 1941 of 200 tons or less of any metal, shall have a zero quota for such metal, except as provided in (E) below.

(B) Intermediate Quotas Between Zero and 100% Quotas.

Any property, except as provided in (E) below, which during 1941 produced more than 200 tons but less than 600 tons of any metal, shall have a quota for such metal based upon a figure obtained by deducting 200 tons from the 1941 output of such metal, and multiplying the remainder by $1\frac{1}{2}$. The resultant figure shall be divided by 12 to arrive at the property's monthly quota.

(C) 100% Quota.

Any property, except as provided in (D) or (E) below, which during 1941, produced more than 600 tons of any metal shall have a quota for such metal equal to the property's 1941 rate of production of that metal. A property's 1941 rate of production of any metal shall be determined by dividing its production of that metal for the year by the number of weeks during which the property was in operation, multiplying the resultant figure by 52 in order to translate a partial year's production into a yearly rate, and dividing by 12 in order to arrive at a monthly rate to be used for quota purposes.

(D) Special Quotas Less Than 100%.

In special cases a property may be assigned a quota less than 100% of its 1941-monthly rate of production.

[fol. 55] (E) Special Quotas in Excess of 100%.

In the case of certain properties, special quotas higher than 1941 production will be established, based upon the tonnages which can reasonably be expected to be produced from such properties at the established ceiling price for each metal—i. e., 12 cents for copper, 8.25 cents for zinc, and 6.50 cents for lead. Likewise, persons and companies which did not operate certain mining properties during 1941 but had plants under way to operate them may be assigned quotas on such properties higher than zero. All those for whose properties such special quotas are being considered have already been notified.

"6. Should any property fail to maintain its quota production in any month or months, premium payments will not be made until the accumulated deficit is made up by over-quota production in subsequent months. Material deficits due to major calamities such as floods or fires will not be so accumulated. If conditions develop which make it impossible for the quota production of a property to be maintained, the government will consider applications for reduction of the quota. However, the government reserves the right to restore any initial quota which has been reduced."

13. Pursuant to such rules and regulations a joint committee for the War Production Board and Office of Price Administration, known as the "Quota Committee", was appointed and that Committee fixed quotas for the properties of the various Mining Companies, parties to this Stipulation. Such quotas have been approved by Metals Reserve Company.

14. Quotas are established on a monthly basis and premiums are paid for production of ore in any month in excess of the established quota, except that if in any month there is a deficiency, this deficiency must be made up in the succeeding month or months. In the determination and fixing of initial quotas by the Quota Committee, neither costs of production nor profits are taken into account. In certain cases where operation of producing properties show that production of lead or zinc cannot be increased or maintained without substantial expenditures for greatly increased development work, rehabilitation of underground workings or [fol. 56] additional facilities, provision has been made for the payment of additional premiums in excess of "A" quotas announced on February 9, 1942. The additional premiums were announced by Metals Reserve Company on March 5, 1943, and in these cases, the initial quotas are revised and an additional quota or quotas are assigned which are known as "B" and "C" quotas. From data supplied by the producer showing such expenditures and increased costs of production, "B" and "C" quotas are established which are intended to supply additional premiums to the extent necessary to provide an adequate operating margin. After quotas are established, premium payments are made solely upon the basis of production in excess of allotted quotas.

On June 18, 1943, Metals Reserve Company announced its

plan for paying a Special Additional Premium for copper in addition to the regular premium for those mines which produced less than 2,000 tons of copper during 1942 and which require increased revenue to obtain maximum production. The revised quotas providing for additional premiums for lead and zinc and Special Additional Premium for copper are subject to cancellation by Metals Reserve Company upon thirty days' notice.

15. Premium payments are made on the basis of certain stated percentages of total metal contents of ores, concentrates or other qualified materials, such percentages having been specified by Metals Reserve Company based upon normal metal recovery from such ores, concentrates or other qualified materials. The percentages fixed by Metals Reserve Company may or may not be the same as fixed under mine-smelter contracts, mill-smelter contracts or mine-mill contracts.

16. On March 7, 1942, Metals Reserve Company issued a statement which, as revised January 20, 1943, reads as follows:

March 7, 1942
(Revised 1-20-43)

Program for Premium Payments by Metals Reserve Company on Production of Copper, Lead and Zinc in Excess of Monthly Production Quotas.

In effecting the program originally announced by the [fol. 57] Honorable Jesse H. Jones on January 12, 1942, Metals Reserve Company will pay a premium on all domestic production of copper, lead and zinc in excess of monthly quotas established by the War Production Board and the Office of Price Administration and approved by Metals Reserve Company, which will reflect the difference between the respective ceiling prices for the materials involved and the equivalent of 17¢ per pound Connecticut Valley for copper, 9 1/4¢ per pound New York for lead, and 11¢ per pound East St. Louis for zinc. With respect to excess production of Tri-State District concentrates (which are being handled under separate arrangement, as explained later herein), the premiums to be paid, on the basis of the present ceiling prices, are \$29.70 per dry ton for 60% zinc sulphide concentrates and \$41.80 per dry ton for 80% lead concentrates, respectively, with an adjustment of five cents (5¢)

for each change of one-tenth of one percent (.1%) in grade above and below 60%, as to zinc sulphide concentrates, and above and below 80%, as to lead concentrates. The premium program will be operative for a period of not to exceed three and one-half ($3\frac{1}{2}$) years from February 1, 1942, but may be terminated earlier should the National Emergency come to an end prior to July 31, 1945, in which event settlement with eligible producers will be made on the basis hereinafter mentioned.

With regard to excess production from the usual "custom ores", various smelting companies throughout the United States have been designated as agents for Metals Reserve Company to obtain and transmit to it the necessary data required for the making of the premium payments. Each producer representing himself as eligible for any premium payment in any month must (1) cause the smelting company to which he ships to be furnished, as agent for Metals Reserve Company, with a sworn producer's affidavit (forms thereof can be obtained by the producer from the smelting company) showing, among other things, the amount of material in excess of quota delivered during the month covered by such affidavit for which he has been paid or will be paid and on which he is eligible for a premium, and (2) cause the smelting company to be furnished with all necessary information so as to enable it to supply Metals Reserve [fol. 58] Company with a statement setting out all data required for the making of the premium payments.

Due to the special method of marketing concentrates which prevails in the Tri-State District, the premium program, as the same relates to Tri-State District zinc sulphide concentrates and lead concentrates, will be handled under a somewhat different arrangement than that described immediately above. Mr. Leslie H. McColgin, Joplin, Missouri, has been designated as representative for Metals Reserve Company in the Tri-State District, and all producers of Tri-State District concentrates representing themselves as eligible for premium payments must cause their sworn affidavits and other required data to be furnished to Mr. McColgin, who will transmit to Metals Reserve Company the necessary papers supporting requests for premium payments.

Following receipt in each month of its agents' and representative's statements, together with the sworn producers' affidavits, Metals Reserve Company will arrange for the payments to be made promptly to the producers.

A principal requirement of the program is that any deficiency in monthly deliveries below the monthly production quota of any producer must be made up in the next succeeding month or months before such producer can receive any premium payment on excess quota production, and the producer's affidavit will be required to show that such deficiency has been made up.

Should the National Emergency come to an end prior to July 31, 1945, Metals Reserve Company will give notice of its intention to terminate the premium program thirty days from the date of the giving of such notice. Thereupon the actual output of each producer, which has been in excess of quota, shall be averaged on a monthly basis for the six calendar months prior to the notice of termination, and such average shall be considered as representing such producer's "monthly capacity to produce in excess of quota" as of the date when notice of termination is served, and such "monthly capacity to produce in excess of quota", multiplied by the number of months remaining before July 31, 1945, shall be considered to be such producer's "total unfulfilled excess production".

[fol. 59] In the event that any producer shall have had excess output for a period of less than six months prior to the notice of termination, then Metals Reserve Company may at its option either (a) base such producer's "monthly capacity to produce in excess of quota" on such producer's rate of excess production during such lesser period, or (b) appoint by agreement with such producer, an arbiter, who shall determine such producer's true "monthly capacity to produce in excess of quota" as of the date when the notice of termination is served.

Metals Reserve Company, having thus established the producer's total unfulfilled excess production", shall thereupon at its option either:

1. Agree to accept a quantity of material equal to such producer's "total unfulfilled excess production", and to settle for such material on the basis of 17 cents for copper, 11 cents for zinc, and 9 1/4 cents for lead, and, as respects Tri-State District concentrates, on the basis of \$84.98 per dry ton for 60% zinc sulphide concentrates, and on the basis of \$118.00 per dry ton for 80% lead concentrates, but leaving the producer free to deliver this material from any part of his production, whether above quota or below quota; or

2. Settle in cash for such "total unfulfilled excess production" (without obligation on the producer to make any further deliveries), at the rate of $2\frac{1}{2}$ cents for copper, $1\frac{3}{8}$ cents for zinc, and $1\frac{3}{8}$ cents for lead, and, as to Tri-State District concentrates, at the rate of \$14.85 per dry ton for 60% zinc sulphide concentrates, and at the rate of \$20.90 per dry ton for 80% lead concentrates.

Metals Reserve Company

17. Payment of premiums is made by Metals Reserve Company upon the basis of an affidavit of the producer and a statement by Metals Reserve Company's designated agent transmitting such affidavit and in support of the producer's request for premium payments. Such affidavit and statement are required to be made on forms prescribed by Metals Reserve Company and are as follows:

[fol. 60]

Affidavit of Producer

Delivering Copper and/or Lead and or Zinc, Taken on or After February 1, 1942, from Mines, Mine Dumps, and Tailing Piles in Excess of Monthly Production Quota(s)

State of _____ County of _____ ss

The undersigned, being duly sworn, deposes and says:

(1) That _____ of which this
 affiant is _____ (Name of producer)
 _____ produced, and delivered to
 _____ (Relationship to purchaser)
 _____ at its
 _____ (Company) _____ (Copper, lead, zinc, or custom milling)
 Plant known as _____ and situated in the County
 of _____ State of _____ during the
 month of _____, 194____, the quantities of copper,
 lead, and zinc hereinafter listed:

(2) That (his)(its) monthly production quota(s) as established by the War Production Board and the Office of Price Administration (is) (are) as listed below:

(3) That (his)(its) monthly production quota(s), as hereinafter stated, (has)(have) been filled and the amount(s) of material(s) specified therein (has)(have) been produced, and delivered for sale during the month above mentioned, in addition to the amount(s) of ma-

terial(s) in excess of quota(s) produced and delivered as hereinafter listed:

(4) The deficiencies below said quota(s), if any, for all previous months (has)(have) been produced and delivered before computing the amount(s) of material(s) stated to be in excess of quota(s), and

(5) That all such material(s) (has)(have) been produced and delivered by the above producer and (was)(were) taken from sources within the United States, more particularly from the mine or mines or mine dumps or tailing piles known as _____ and located at _____

(Name of mine)

(Location of mine)

and (has)(have) not been recovered from secondary or scrap metal.

[fol. 61]

	Pounds of copper	Pounds of lead	Pounds of zinc
To Lead Smelter	x 85%	x 95%	x 90%
To Copper Smelter	x 97%	x 70%	x 77%
To Zinc Smelter	x 70%	x 60%	
To Concentrator	x 87%	x 86%	
Production for premium purposes			
Monthly quota(s)	A		
"	B		
"	C		
Deficiency from previous month(s)	A		
"	B		
"	C		
Excess production eligible for premiums	A		
Excess production eligible for premiums	B		
Excess production eligible for premiums	C		

[fol. 62] The affiant represents to Metals Reserve Company that all information contained herein is correct and true and is stated for the purpose of inducing Metals Reserve Company to make payment of a premium on the material(s) set out herein as being in excess of the producer's monthly production quota(s) assigned to the above-described property.

Subscribed and sworn to before me this _____ day of _____ 194 _____

Notarial Seal.

My commission expires

(Affiant)

(Officer administering oath)

Note: Metals Reserve Company is a corporation duly created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended. Section 16(a) of the Reconstruction Finance Corporation Act, as amended, provides: "Whoever makes any statement knowing it to be false . . . for the purpose of obtaining money, property, or anything of value, under this Act, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both."

Receipt from Producer

This is to certify to the Metals Reserve Company that the undersigned has received the following premiums from _____ as Agent for Metals Reserve Company:

	Copper	Lead	Zinc
A	\$ _____ lbs. \$ _____	lbs. \$ _____	lbs. \$ _____
B	\$ _____	lbs. \$ _____	lbs. \$ _____
C	\$ _____	\$ _____	lbs. \$ _____
Total	\$ _____	\$ _____	\$ _____

for eligible excess quota metals produced from the above-described mining property and delivered during the month hereinabove stated.

(Name of producer)

(Date)

194 _____

This form should not be used for Tri-State District concentrates.

[fol. 63] Statement of Monthly Production of Producers of Copper and/or Lead and/or Zinc, in Excess of Their Quotas as Fixed by War Production Board and Office of Price Administration, Furnished to Metals Reserve Company in Support of Such Producer's Requests for Premium Payments on Such Excess Production, as Measured by Receipts at the Plant

United States Smelting Refining and Mining Company
(Agent for Metals Reserve Co.)

(Calendar Month Received at Plant)

Midvale, Utah
Location of
Plant

(Type of Plant)

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Name of Producer	Name of Mine	Location of Mine	Total Copper, Lead or Zinc Contents Re- ceived During Month (Pounds)	Production for Premium Purposes (Pounds)	Monthly Quota (Pounds)	Deficiency, At End of Pre- vious Month (Pounds)	Net Excess at End of Current Month (Pounds)	Premium Paid (Pounds)	Amount of Premiums Payable in Respect of Net Excess

Total Col. 10

Certified Correct
By Date
(Authorized Officer) Auditor.

[fol. 64] The following are copies submitted by the named companies:

Affidavit of Producer

Delivering Copper and/or Lead and/or Zinc Taken on or After February 1, 1942, from Mines, Mine Dumps, and Tailing Piles in Excess of Monthly Production Quota(s)

State of Utah, County of Salt Lake, ss:

(Copy)

The undersigned, being duly sworn, deposes and says:

(1) That Tintic Standard Mining Company of which this
(Name of producer)
affiant is Copper and Lead produced, and delivered to
(Relationship to producer)
American Smelting and Refining Company,
International Smelting and Refining Company at its
(Company)

Copper and Lead Plant known as Garfield
(Copper, lead, zinc, or custom milling)
Plant and Tooele Plant as situated in the County of Tooele,
State of Utah, during the month of October, 1943, the quantities of copper, lead and zinc hereinafter listed:

(2) That (his)(its) monthly production quota(s) as established by the War Production Board and the Office of Price Administration (is)(are) as listed below:

(3) That (his)(its) monthly production quota(s), as hereinafter stated, (has)(have) been filled and the amount(s) of material(s) specified therein (has)(have) been produced, and delivered for sale during the month above mentioned, in addition to the amount(s) of material(s) in excess of quota(s) produced and delivered as hereinafter listed:

(4) The deficiencies below said quota(s), if any, for all previous months (has)(have) been produced and delivered before computing the amount(s) of materials(s), stated to be in excess of quotas, and

[fol. 65] (5) That all such material(s) (has)(have) been produced and delivered by the above producer and (was)(were) taken from sources within the United States, more particularly from the mine or mines or mine dumps or tailing piles known as Tintic Standard and located at
(Name of Mine)

Evidend, Utah, and (has)(have) not been recovered from
(Location of Mine)
secondary or scrap metal.

[fol. 66]

	Pounds of copper	Pounds of lead	Pounds of zinc
To Lead Smelter.....?	— x 85%	475298 x 95%	—
To Copper Smelter.....	39658 x 97%	157939 x 70%	x 90%
To Zinc Smelter.....	x 70%	x 60%	x 77%
To Concentrator.....	x 87%	x 86%	
Production for premium purposes.....	38460	562090	
Monthly quota(s).....A	0	460000	
".....B	.....	.....
".....C	.....	.....
Deficiency from previous month(s).....A	—	—	
".....B	.....	.....
".....C	.....	.....
Excess production eligible for premiums.....A	38468	102090	
Excess production eligible for premiums.....B	.....	.....
Excess production eligible for premiums.....C	.....	.....

[fol. 67] The affiant represents to Metals Reserve Company that all information contained herein is correct and true and is stated for the purpose of inducing Metals Reserve Company to make payment of a premium on the material(s) set out herein as being in excess of the producer's monthly production quota(s) assigned to the above-described property.

Subscribed and sworn to before me this 7th day of Dec., 1943. (Notarial Seal) My commission expires Oct. 20, 1947.

(Affiant)

Notary Public

(Officer administering oath)

Note: Metals Reserve Company is a corporation duly created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended. Section 16(a) of the Reconstruction Finance Corporation Act, as amended, provides: "Whoever makes any statement knowing it to be false * * * for the purpose of obtaining money, property, or anything of value, under this Act, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both."

Receipt From Producer

This is to certify to the Metals Reserve Company that the undersigned has received the following premiums from American Smelting and Refining Co., as Agent for Metals Reserve Company:

	Copper	Lead	Zinc
A	\$ 1,923 40 38.468 lbs.	\$2,807 48 102,090 lbs.	\$..... lbs.
B		\$..... lbs.	\$..... lbs.
C		\$..... lbs.	\$..... lbs.
Total	\$.....	\$.....	\$.....

for eligible excess quota metals produced from the above-described mining property and delivered during the month hereinabove stated. Tintic Standard Mining Company.

By Auditor

Name of producer)

(Date)

194

This form should not be used for Tri-State District concentrates.

[fol. 68]

Affidavit of Producer

Delivering Copper and/or Lead and/or Zinc, Taken on or
After February 1, 1942, from Mines, Mine Dumps, and
Tailing Piles in Excess of Monthly Production Quota(s).

STATE OF UTAH,

County of Salt Lake, ss:

Copy

The Undersigned, being duly sworn, deposes and says:

(1) That United States Smelting Refining and Mining
(Name of producer)
Company of which this affiant is Vice President and General
(Relationship to producer)
Manager produced, and delivered* to Itself and American
Smelting and Refining Company at their Custom Milling—
(Company)

Lead & Copper Plants known as Midvale Plant Garfield
Plant, respectively and situated in the County of Salt Lake,
State of Utah during the month of October, 1943, the quan-
tities of copper, lead, and zinc hereinafter listed:

(2) That (his) (its) monthly production quota(s) as es-
tablished by the War Production Board and the Office of
Price Administration (is) (are) as listed below:

(3) That (his) (its) monthly production quota(s), as
hereinafter stated, (has) (have) been filled and the
amount(s) of material(s) specified therein (has) (have)
been produced, and delivered for sale during the month
above mentioned, in addition to the amount(s) of material(s)
in excess of quota(s) produced and delivered as hereinafter
listed:

(4) The deficiencies below said quota(s), if any, for all
previous months (has) (have) been produced and delivered
before computing the amount(s) of material(s) stated to be
in excess of quota(s) and

[fol. 69] (5) That all such material(s) (has) (have) been
produced and delivered by the above producer and (was)

* Represented mine production for month stated as shown
by our books and records.

(were) t
particul
ing piles
and (ha
scrap m

[fol. 70]

	Pounds of copper	Pounds of lead	Pounds of zinc
To Lead Smelter.....	6,367 x 85%	48,423 x 95%	
To Copper Smelter.....	7,269 x 97%	55,106 x 70%	
To Zinc Smelter.....	x 70%	x 60%	x 90%
To Concentrator.....	51,633 x 87%	1,693,445 x 86%	1,758,924 x 77%
Production for premium purposes.....	57,384	1,540,939	1,351,371
Monthly quota(s).....	44,000	2,410,000	
.....A.....			
.....B.....			
.....C.....			
Deficiency from previous month(s).....	—	4,867,423	2,603,516
.....A.....			
.....B.....			
.....C.....			
Excess production eligible for premiums.....	13,384	5,736,484	2,969,115
.....A.....			
.....B.....			
.....C.....			

[fol. 71] The affiant represents to Metals Reserve Company that all information contained herein is correct and true and is stated for the purpose of inducing Metals Reserve Company to make payment of a premium on the material(s) set out herein as being in excess of the producer's monthly production quota(s) assigned to the above-described property.


F. S. Mulock,
(Affiant)

Subscribed and sworn to before me this 27th day of April 1944. J. F. Faerber, Notary Public. My
(Officer administering oath)
commission expires October 18, 1945. (Notarial Seal.)

Note: Metals Reserve Company is a corporation duly created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended. Section 16(a) of the Reconstruction Finance Corporation Act, as amended, provides: "Whoever makes any statement knowing it to be false * * * for the purpose of obtaining money, property, or anything of value, under this Act, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both."

Receipt From Producer

This is to certify to the Metals Reserve Company that the undersigned has received the following premiums from U. S. Smelting Refining and Mining Co., as Agent for Metals Reserve Company:

	Copper	Lead	Zinc
A	\$ 669 20 13,384 lbs.	\$ lbs.	\$ lbs.
B		\$ lbs.	\$ lbs.
C			\$ lbs.
Total	\$ 669 20	\$ 	\$

for eligible excess quota metals produced from the above-described mining property and delivered during the month hereinabove stated.

United States Smelting Refining and Mining Company, E. S. Mulock, Vice President and General Manager.

April 27, 1944.

This form should not be used for Tri-State District concentrates.

[fol. 72]

Affidavit of Producer

Delivering Copper and/or Lead and/or Zinc, Taken on or After February 1, 1942, from Mines, Mine Dumps, and Tailing Piles in Excess of Monthly Production Quota(s)

STATE OF UTAH,

County of Salt Lake, ss:

copy

The undersigned, being duly sworn, deposes and says:

(1) That National Tunnel & Mines Co. of which this aff-
 (Name of producer)
 fiant is Chief Clerk produced, and delivered to Interna-
 (Relationship to producer)
 tional Smelting & Refining Co. at its Custom Milling Plant
 (Company)

known as Tooele Plant and situated in the County of Tooele, State of Utah during the month of October, 1943, the quantities of copper, lead, and zinc hereinafter listed:

(2) That (his) (its) monthly production quota(s) as established by the War Production Board and the Office of Price Administration (is) (are) as listed below:

(3) That (his) (its) monthly production quota(s), as hereinafter stated, (has) (have) been filled and the amount(s) of material(s) specified therein (has) (have) been produced, and delivered for sale during the month above mentioned, in addition to the amount(s) of material(s) in excess of quota(s) produced and delivered as hereinafter listed:

(4) That deficiencies below said quota(s), if any, for all previous months (has) (have) been produced and delivered before computing the amount(s) of material(s) stated to be in excess of quota(s), and

(5) That all such material(s) (has) (have) been produced and delivered by the above producer and (was) (were) taken from sources within the United States, more particularly from the mine or mines or mine dumps or tailing piles known as National Tunnel and located at West Interna-
 (Name of mine) (Location of mine)
 tional, Ut. and (has) (have) not been recovered from secondary or scrap metal.

[fol. 73]

	Pounds of copper	Pounds of lead	Pounds of zinc
To Lead Smelter.....	x 85%	x 95%	
To Copper Smelter.....	x 97%	x 70%	
To Zinc Smelter.....	x 70%	x 60%	x 90%
To Concentrator.....	x 87%	x 86%	x 77%
Production for premium purposes.....	586,557	189,375	103,864
Monthly quota(s).....	510,305	162,863	79,975
" ".....	0	0	0
" ".....	0-Spec. 0 10¢	0	0
Deficiency from previous month(s).....	0	0	0
" ".....	0	0	0
" ".....			0
Excess production eligible for premiums.....	510,305	162,863	79,975
Excess production eligible for premiums.....	510,305	162,863	79,975
Excess production eligible for premiums.....			

[fol. 74] The affiant represents to Metals Reserve Company that all information contained herein is correct and true and is stated for the purpose of inducing Metals Reserve Company to make payment of a premium on the material(s) set out herein as being in excess of the producer's monthly production quota(s) assigned to the above-described property.

J. W. Torreyson (Affiant).

November, 1943. F. G. Cannard. My commission
(Officer administering oath)
expires Aug. 1943. (Notarial Seal.)

Note: Metals Reserve Company is a corporation duly created by Reconstruction Finance Corporation pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended. Section 16(a) of the Reconstruction Finance Corporation Act, as amended, provides: "Whoever makes any statement knowing it to be false * * * for the purpose of obtaining money, property, or anything of value, under this Act, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both."

Receipt From Producer

This is to certify to the Metals Reserve Company that the undersigned has received the following premiums from International Smltg. & Ref. Co., as Agent for Metals Reserve Company:

	Copper	Lead	Zinc
A	\$24,515.25 510,305 lbs.	\$4,478.73 162,863 lbs.	\$2,199.31 79,975 lbs.
B	\$51,030.50 510,305 lbs.	\$4,478.73 162,863 lbs.	\$2,199.31 79,975 lbs.
C			\$2,199.31 79,975 lbs.
Total	\$76,545.75	\$8,957.46	\$6,597.93

for eligible excess quota metals produced from the above-described mining property and delivered during the month hereinabove stated.

National Tunnel & Mines Co., per J. W. Torreyson.

Nov. 18, 1943.

This form should not be used for Tri-State District concentrates.

[fol. 75] 18. Metals Reserve Company does not purchase the ores on account of the production of which it pays premiums to the producer; they are not taken into account in tariffs filed by railways and approved by the Interstate Commerce Commission or Public Service Commission fixing freight rates on ores or concentrates, and predicated primarily on metal value content; smelting companies may not participate in such premium payments even though their normal charges be based upon a sliding scale dependent upon the value of the metal contents of ores.

19. In certain instances premium payments are made in advance of a sale of ores or the metals recovered from ores; in other instances such payments are made after sale of the ores. Typical instances are as follows:

(a) Kennecott Copper Corporation ships the precipitates and concentrates resulting from the operation of its reduction works and milling plants to the custom smelter owned and operated by American Smelting and Refining Company at Garfield, Utah; said Smelting Company receives such precipitates and concentrates as a bailee; it smelts such precipitates and concentrates, thereby converting them into blister copper, carrying copper and other metals; it then ships such blister copper to its refineries located outside the State of Utah, where it refines the same, separating the various metals contained therein. Thereafter it returns to Kennecott Copper Corporation in such separated form the equivalent of the copper, gold, silver and other metals contained in the precipitates and concentrates originally delivered to it. Subsequently such metals are marketed by Kennecott Copper Corporation.

Premium payments are made by Metals Reserve Company to Kennecott Copper Corporation on the basis of the determined metal content of the precipitates and concentrates delivered to American Smelting and Refining Company. Affidavits covering each month's over-quota production as so determined are forwarded through American Smelting and Refining Company to Metals Reserve Company and premium payments are received in from 17 to 27 days thereafter. The metals recovered from such precipitates and concentrates ordinarily become available for marketing approximately three months after their delivery to the smelter.

(b) United States Smelting Refining and Mining Company processes most of the ore produced at its own properties at its mill and smelter at Midvale, Utah, and the resulting products are shipped out of the state for further processing to refined metal. The processing is done by a subsidiary company or independent companies, principally on a toll basis, which provides for the return of an agreed percent of equivalent metals which are marketed by it.

Premium payments are received by United States Smelting Refining and Mining Company on the basis of monthly affidavits showing the production according to the Company's records from each mine owned by the Company and from 30 to 90 days before the recoverable metals are available for sale.

(c) An independent or custom shipper selling its ore to a smelting company or custom mill receives premium payments after the sale of such ores. At the end of each month an affidavit is prepared covering shipments received by the smelter during such month, which affidavit is transmitted to Metals Reserve Company and on the basis thereof premiums are paid.

Where a producer ships part of its ores to one smelter and part to another, it is required to designate through which smelter its premium payments are to be made and all premium payments covering ores of such producer are made through the smelter so designated; notwithstanding that part of the ores, on account of the production of which premiums are paid, were shipped or sold to another smelter.

The following companies are independent or custom shippers: Tintic Standard Mining Company; Eureka Lily Consolidated Mining Company; Park-Utah Consolidated Mining Company; Silver King Coalition Mines Company; New York Mining Company; Eureka Bullion Mining Company; Ohio Copper Company; Colorado Consolidated Mining Company; Eagle & Blue Bell Mining Company; Montana-Bingham Mining Company; Niagara Mining Company; Chief Consolidated Mining Company.

Silver King Coalition Mines Company sells its concentrates [fol. 77] F. O. B. its mill at Park City. Currently Chief Consolidated Mining Company is selling all its ores to Combined Metals Reduction Company, but receives all premium payments through American Smelting, Refining and Mining Company.

20. The Mining Companies caused to be prepared and submitted to Metals Reserve Company a memorandum respecting the inclusion of premium payments in "net proceeds" and in "mine occupation tax". After examining such memorandum a letter was written by the President of Metals Reserve Company to Mr. F. S. Mulock. Such memorandum and letter were, upon proper identification, received in evidence by the Commission (but the Commission shall not be bound by the facts, inferences or conclusions therein stated) and read as follows:

(letterhead)

METALS RESERVE COMPANY, WASHINGTON

Charles B. Henderson, President

Mr. F. S. Mulock, Vice President and General Manager,
United States Smelting Refining and Mining Company,
Newhouse Building, Salt Lake City, Utah.

DEAR MR. MULOCK:

At your request, we have examined the attached "Memorandum Re Inclusion of Premium Payments in 'Net Proceeds' for Assessment of Metalliferous Mines and In Mine Occupation Tax", which we understand was prepared by Utah mine operators for presentation to the Utah State Tax Commission.

Metals Reserve Company has made no study of the provisions of the Utah laws relating to taxation of mines, and is not in a position to express any opinion concerning statements in the Memorandum on that subject. However, the statements in the Memorandum with respect to premium payments by Metals Reserve Company, beginning with the final paragraph on page 2 and continuing to the end of the Memorandum, are, in our opinion, factually true and correct.

For your information, we are enclosing statements issued by this Company under date of March 7, 1942 (Revised) and March 5, 1943, together with copy of Press Release RFC [fol. 78] 1802, which collectively contain full details of this premium payment program.

With best wishes, I am

Sincerely yours, Charles B. Henderson, President.

Enclosures.

Memorandum Re Inclusion of Premium Payments in "Net Proceeds" for Assessment of Metalliferous Mines and in Mine Occupation Tax.

The State Tax Commission, in assessing metalliferous mines, has included in "net proceeds" amounts received from Metals Reserve Company as premium payments on account of production and in fixing Occupation Tax has likewise included such premium payments. Such actions by the State Tax Commission are unwarranted as a matter of law:

For purposes of assessment the "net annual proceeds" of a metalliferous mine are defined as "the gross proceeds realized during the preceding calendar year from the *sale or conversion into money or its equivalent* of all ore from such mine or mining claim extracted * * * during or previous to the year for which the assessment is made,"—less the deductions enumerated in Section 80-5-57, Utah Code Annotated, 1943.

The Mining Occupation Tax is "an occupation tax equal to 1% of the gross amount received for, or the gross value of metalliferous ore sold * * *".

The basis for computing the tax is as follows:

(a) "If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim, from the sale of all ores or metals during the calendar year, * * *"—less the reasonable cost of transportation.

(b) If the extracted ore is treated at a mill, smelter or reduction works which receives ores from independent [fol. 79] sources and which is owned or controlled by the same interest owning or controlling the mine or mining claim, such disposal shall be treated as a sale, within the meaning of this section for the purpose of determining gross proceeds, or otherwise, and in such determination a rate or charge for sampling, assaying, milling and smelting the ores and extracting the metals and minerals therefrom, shall be deducted, which shall not exceed an amount to be determined by applying the same rates as are applied by such mill, smelter or reduction works, or competing works to ores of substantially like character and in like quantities received from

independent sources". (Transportation charges also to be deducted.)

(c) "If a mill or other reduction works is operated exclusively in connection with a mine, such mill or reduction works shall be treated as a part of the mine and the cost of operating such mill or reduction works shall for the purpose of fixing the occupation tax . . . be regarded as part of the cost of mining and cost of assaying, sampling, smelting, refining and transportation only shall be deducted". (See Section 80-5-66, Utah Code Annotated, 1943.)

Note that "net proceeds" are limited to an amount received "from the sale or conversion into money or its equivalent of all ores" and that the Occupation Tax is computed by taking "the amount of money or its equivalent actually received . . . from the sale of all ores or metals",—less a specified deduction for transportation and less a specific exemption of \$20,000. Also that the provisions respecting treatment of ores at a mill or other reduction works operated exclusively in connection with a mine and treatment at a mill, smelter or reduction works owned in common with the mine and which also receives ores from independent sources, are for the purpose of insuring that the basis where an actual sale is made shall not be reduced by excessive or unreasonable charges.

Both with respect to "net proceeds" and with respect to the Occupation Tax the statutes put it beyond doubt that only the amounts received from the sale or conversion into money or its equivalent of ores produced by a mine are to be taken into account. All other receipts and revenues are excluded. It would not be contended for instance that amounts [fol. 80] received by a mining company for hauling men, supplies, ore or waste for another company, or amounts received as compensation for use of its workings granted by one company to another, would be included in fixing net proceeds or computing Occupation Tax.

There is no more reason for including premium payments made by Metals Reserve Company to encourage increased production of ore than for including such payments as above mentioned.

Premium payments made by Metals Reserve Company are not payments made by the Company or received by the

Mining Company for the sale or conversion into money or its equivalent of any ores:

Such premium payments are not realized from a sale; they are not paid by a purchaser (Metals Reserve Company does not purchase the ores upon account of which it makes premium payments); they are not paid at the time of a sale, nor are they based upon recoverable metals or actual recoveries at any particular concentrator or smelter, nor upon the terms of private settlement contracts; they are specifically exempted from the Excess Profits Tax; they are not taken into account in tariffs filed by railways and approved by the Interstate Commerce Commission or Public Service Commission fixing freight rates on ores or concentrates and predicated primarily on metal value content; smelters may not participate in such payments even though their normal charges be based upon a sliding scale dependent upon value of metal contents.

The announced purpose of premium payments was "to expand output of copper, lead and zinc because of their importance in the production of armaments", "* * * to compensate operators for extra costs involved for bringing out additional metal output", "* * * to make it possible quickly to increase production by mining low grade sub-marginal ores and to develop additional ore reserves". (See OPA Release, February 9, 1942.)

Such purpose is emphasized by the order freezing royalties and prohibiting diversion of any part of "B" and "C" quotas,—it being said that diversion of such added premiums into increased royalties to landowners would be "an unwarranted expenditure of public funds which can contribute nothing to further production".

To the extent that any portion of such premiums are taken by a state on account of a property tax, the purpose of Metals Reserve Company in paying the same would be defeated and such funds be diverted from use in the production of ores to a contribution to the support of state or local government.

21. The net proceeds valuations involved in the assessments of the protesting companies whose signatures are attached to this stipulation, are correctly set forth in a statement attached to and made part of this stipulation, the same being headed "Net Proceeds Valuations Reported by Protesting Companies, and Valuations Assessed by Tax

Commission, Tax Assessment for 1944, Operations for 1943." This statement shows under designated headings the Gross Proceeds reported by mining companies in which are not included the metal premium payments, the amounts of metal premium payments, the gross proceeds used by the Tax Commission in computing the net proceeds valuation, the deductions allowed by the Tax Commission, the net proceeds according to returns of the mining companies, the net proceeds as computed by the Tax Commission, the net proceeds valuation according to returns of the mining companies, and the net proceeds valuation as assessed by the Tax Commission for the year 1944. The difference between the net proceeds valuation assessed and the net proceeds valuation reported represents for each company the amount of the net proceeds valuation in controversy.



(Here follows 1 paster, side folio 83-84)

[fols. 83-84]

**Net Proceeds Valuations Reported by Protesting Companies and Valuation Assessed by Tax Commission
Tax Assessment for 1944, Operations for 1943**

	Gross Proceeds (Smelter Returns*)	Metal Premium Payments	Gross Proceeds Assessed	Deductions Allowed	Net Proceeds Reported	Net Proceeds Assessed	Net Proceeds Valuation Reported	Net Proceeds Valuation Assessed
Chief Consolidated Mining Co.	\$ 125,227.92	\$ 492,238.84	\$ 617,466.76	\$ 534,912.23	None	\$ 82,554.53	None	\$ 165,109
Colorado Consolidated Mines Co.	21,538.25	13,758.12	35,296.37	42,700.91	None	None	None	None
Combined Metals Reduction Co.—Butterfield Mine	188,971.12	238,209.81	427,180.93	488,742.36	None	None	None	None
Combined Metals Reduction Co.—Calumet Mine	390,679.96	272,150.86	662,830.82	501,888.44	None	160,942.38	None	321,885
Eagle & Blue Bell Mining Co.	51,293.06	1,439.39	52,732.45	75,206.79	None	None	None	None
Eureka Bullion Mining Co.	92,404.74	7,144.87	99,549.61	65,080.56	27,324.18	34,469.05	54,648	68,938
Eureka Lily Cons. Mining Co.	44,565.19	10,792.25	55,357.44	38,462.80	6,102.39	16,894.64	12,205	33,789
International Smelting Co.—Tintic Bullion Mine	316,834.99	25,892.69	342,727.68	271,841.10	44,993.89	70,886.58	89,588	141,773
Kennecott Copper Corporation	96,626,500.87	3,781,421.55	100,407,922.42	48,858,174.40	47,768,326.47	51,549,748.02	95,536,653	103,099,496
Montana Bingham Cons. Mining Co.	84,171.43	32,958.59	117,130.02	55,236.05	28,935.38	61,893.97	57,871	123,788
National Tunnel & Mines Co.	397,855.61	886,975.64	1,284,831.25	1,464,156.69	None	None	None	None
New Park Mining Co., Keetley	1,233,127.17	376,348.07	1,609,475.24	951,112.77	282,014.40	658,362.47	564,029	1,316,725
Niagara Mining Co.	30,358.95	1,227.85	31,586.80	69,750.86	None	None	None	None
Ohio Copper Company of Utah	262,682.94	142,889.45	405,572.39	268,624.41	None	136,947.98	None	273,896
Park Utah Construction Mines Co.	782,564.05	905,506.66	1,688,070.71	1,229,676.35	None	458,394.36	None	916,789
Silver King Coalition Mines Co.	1,455,245.89	453,353.54	1,908,599.43	1,596,191.21	None	312,408.22	None	624,816
Tintic Standard Mining Co.	660,760.99	440,494.16	1,101,255.15	802,154.33	None	299,100.82	None	598,202
Tintic Standard Mining Co.—Iron Blossom Mine	2,486.29	5,985.64	8,471.93	4,912.13	None	3,559.80	None	7,120
U. S. Smelting Co.—Hidden Treasure Mine	144,693.74	24,489.40	169,183.14	150,220.26	None	18,962.88	None	37,926
U. S. Smelting Co.—U. S. & Lark Mine	3,595,831.45	99,078.56	3,694,910.01	2,966,884.25	728,947.20	728,025.76	1,257,894	1,456,052

* Smelter Returns, except in case of Kennecott Copper Company, which reports its sales of metal in the open market.

[fols. 85-86] The amount of occupation tax involved in the assessments of the protesting companies whose signatures are attached to this stipulation are correctly set forth in a statement attached to and made a part of this stipulation, the same being headed "Statement of Occupation Tax Reported by Protesting Companies, and Amounts Assessed by Tax Commission, Assessment for 1944, Operations for 1943." This statement shows under designated headings the amounts reported by the mining companies as the basis for computation of the occupation tax—not including the metal premium payments, the amounts of metal premium payments, the amounts used by the Tax Commission in computing the occupation tax, the amount of the occupation tax according to the returns of the mining companies, and the amounts of the occupation tax assessed by the Tax Commission. The difference between the occupation tax assessed, and the occupation tax reported represents for each company the amount of occupation tax in controversy.

[cols. 87-88]

Statement of Occupation Tax Reported by Protecting Companies and Amounts Assessed by Tax Commission
Assessment for 1944, Operations for 1943

	Reported Basis for Computation of Tax	Metal Premium Payments	Assessment Basis for Computation of Tax	Occupation Tax Reported	Occupation Tax Assessed
Chief Consolidated Mining Co.	105,227.92	492,238.84	597,466.76	1,052.28	5,974.67
Colorado Consolidated Mines Co.	1,538.25	13,758.12	15,296.37	15.38	152.96
Combined Metals Reduction Co.—Butterfield Mine	168,971.12	238,269.81	407,180.93	1,689.71	4,071.81
Combined Metals Reduction Co.—Calumet Mine	370,679.96	272,150.86	642,830.82	3,706.80	6,428.31
Eagle & Blue Bell Mining Co.	31,293.06	1,439.39	32,732.45	312.93	327.32
Eureka Bullion Mining Co.	71,332.77	7,144.87	78,477.64	713.33	784.78
Eureka Lily Cons. Mining Co.	24,565.19	10,792.25	35,357.44	245.65	353.57
International Smelting Co.—Tintic Bullion Mine	294,910.16	25,892.69	320,802.85	2,949.10	3,208.03
Kennecott Copper Corporation	77,762,913.44	3,781,421.55	81,544,334.99	777,629.13	815,443.35
Montana Bingham Cons. Mining Co.	64,171.43	32,958.59	97,130.02	641.71	971.30
National Tunnel & Mines Co.	322,949.32	886,975.64	1,209,924.96	3,229.49	12,099.25
New Park Mining Co.—Keechley	1,213,127.17	376,348.07	1,589,475.24	12,131.27	15,894.75
Niagara Mining Co.	30,358.95	1,227.85	31,586.80	303.59	315.87
Ohio Copper Co. of Utah	234,027.18	142,889.45	376,916.63	2,300.46	3,729.36
Park Utah Cons. Mines Co.	740,805.95	905,596.66	1,646,312.61	7,408.06	16,463.13
Silver King Coalition Mines Co.	1,396,983.32	453,353.54	1,850,336.86	13,969.83	18,503.37
Tintic Standard Mining Co.	640,760.99	440,494.16	1,081,255.15	6,407.61	10,812.55
U. S. Smelting—Hudon-Treasure Mine	124,693.74	24,489.40	149,183.14	1,246.94	1,491.83
U. S. Smelting Co.—U. S. & Lark Mine	3,575,831.45	99,078.56	3,674,910.01	35,758.31	36,749.10

[fol. 89] 21. (a)

At the hearing on the above matter before the Commission it was stipulated that the attached letter was written by the Commission to the Attorney General of Utah and that his reply thereto, also hereto attached, was received by the Commission as of the dates which they respectively bear. It was further stipulated that such letter and the reply thereto should become a part of the foregoing stipulation but it was agreed that no party hereto is bound by the facts, inferences or conclusions therein contained.

April 25, 1944.

The Honorable Grover A. Giles, Attorney General of Utah,
Building.

DEAR MR. GILES:

As you are aware, Sections 80-5-57 and 80-5-46, Utah Code Annotated, 1943, impose a "net annual proceeds" tax and an "occupation" tax upon proceeds received from certain mining operations. The amount of tax is based upon gross proceeds after certain specified deductions are taken.

About a year ago a question arose as to whether or not premium payments received by the mining companies subject to this tax should be included in arriving at the gross proceeds. These premium payments were made to the mining companies by the Metals Reserve Corporation on the basis of established quotas and were made for the purpose of increasing production.

In connection with the problem as it arose a year ago, certain facts were presented to the Commission. It appeared that a local committee was established to determine the quotas, and premium payments were to be made for production in excess of such quotas. The purpose of such payments was to obtain increased productions in aid of the war effort. The production in excess of the quotas could be realized only at an increased cost of production. However, there was no direct relationship between an increase in cost which might arise and the amount paid by way of [fol 90] premium payments. The payments were set at so much per pound for production in excess of the established quotas. The payments per pound varied with the different types of metals and were made before the ore was actually

sold or converted by the mining companies. Payments made by Metals Reserve Corporation were made for and on behalf of the United States Government.

As a result of all the facts which were presented to the Commission it was concluded that the amounts received by mining companies within the State of Utah by way of premium payments did not constitute part of the gross proceeds for the purpose of arriving at the amount of "net proceeds" and "occupation" taxes due the State of Utah.

It now appears that certain mining companies will realize no net proceeds if such companies are permitted to deduct the full amount of the items set out in 80-5-57 and 80-5-66 as deductions. The Commission would like to have your opinion as to whether or not it would be proper to insist upon the deductions being prorated in proportion to the amount received as a premium payment. In other words, if a company receives half its income as a premium payment, may the Commission permit said company to deduct only 50% of the amounts paid out which are deductible items under 80-5-57 and 80-5-66, Utah Code Annotated, 1943?

Your reply in this matter will be greatly appreciated.

Respectfully yours, State Tax Commission, J. Lambert Gibson, Chairman.

418:JH.

May 12, 1944.

J. Lambert Gibson, Chairman, State Tax Commission, Building.

DEAR MR. GIBSON:

In your letter of April 25, 1944, you request an opinion from this department with respect to the monies received by mining companies from the Metals Reserve Company as [fol. 91] "premium payments"—whether such monies are to be included as "gross proceeds" within the meaning of Section 80-5-57, Utah Code Annotated, 1943; and whether such monies should be included in determining the "occupation tax" within the meaning of Section 80-5-66, Utah Code Annotated, 1943.

While there is a difference in the wording of Sections 80-5-57 and 80-5-66, the conclusion to be reached with respect to the former section will, as hereinafter disclosed,

be determinative of the conclusion to be reached with respect to the latter.

Considering first the problem of whether "premium payments" should be included in "gross proceeds", the problem seems to be one of interpretation of the underscored part of Section 80-5-57, as follows:

"The words, 'net annual proceeds,' of a metalliferous mine or mining claim are defined to be the *gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent of all ores* from such mine or mining claim extracted by the owner or lessee, contractor or other person working upon or operating the property"

In order to determine whether "premium payments" fall within the term "gross proceeds", we must consider the nature and purpose of such "premium payments". The following facts appear from the testimony taken before the State Tax Commission in June, 1943:

1. At the outset, the Office of Price Administration on August 12, 1941, issued its price schedule No. 15 to the effect that "no person shall sell, offer to sell, deliver or transfer copper; and no person shall buy, offer to buy, or accept delivery of copper at prices higher than the maximum price set forth in Appendix A hereof". The same type of restriction was imposed as to the sale or purchase of lead and zinc so that the producers of metals were specifically limited to the ceiling price in the sale of ores to private industry.

2. In order to encourage greater production of ores, the Federal Government, through the Metals Reserve Company, offered a premium (to be in addition to the maximum price which the producer might receive) for the production of ores above a given quota.

3. The quota was determined on the basis of the 1941 ore production of the property involved and ranged from less than 1941 production to more than 1941 production. One purpose of the "premium payment" plan was to "expand the output of copper, lead and zinc because of their importance in the production of armaments". In general, quotas were fixed "to include ore output that can reasonably be expected at established market prices for the

metals of 12¢ per pound for copper, 8.25¢ for zinc and 6.50¢ for lead."

4. The "premium payments" are calculated on the basis of the amount of metal content of the ores produced and delivered to the smelter. The affidavit of the producer requires him to state the quantities of copper, lead and zinc "produced and delivered to

(Company)

5. The total cost of producing the ores, on which "premium payments" are received, is included by the producer in determining his "net proceeds" under Section 80-5-57, although, a further purpose of the plan of extending "premium payments" to producers was "to compensate operators for extra costs involved in bringing out additional metal output".

6. The premium payments are received from the Federal Government through the Metals Reserve Company although the ore is sold to private enterprise.

In determining the status of "premium payments", the following conclusions are inescapable:

The amounts paid by Metals Reserve Company represent an additional value of the metal produced above the quota. There is no doubt that the metal produced could be sold on the market for a higher price than the ceiling set by the Office of Price Administration. In fact, the figures 17¢ for copper, 9½¢ for lead and 11¢ per pound for zinc are used in the "Program for Premium Payments by Metals Reserve Company on Production of Copper, Lead and Zinc in [fol. 93] Excess of Monthly Production Quotas". As stated in that bulletin, the company will pay a premium "which will reflect the difference between the respective ceiling prices for the materials involved" and the figures therein set forth. Inasmuch as the Federal Government eventually purchases, in connection with the war program, practically all of the metal produced, it matters little whether it makes a premium payment at the time the ores are mined or whether it pays additional for the finished products containing the metal. Although the quotas set and the basis for evaluation of the ore as to the metal content are somewhat arbitrary, there is no doubt that it was intended by the plan to pay an additional amount for the actual metal sent to the market by the producer. In most instances, the

ore is actually sold by the producer to the smelting or refining company so that the "premium payment" is made in connection with the sale of the ore. One exception to this is the Utah Copper Company, which smelts its own ore and in connection with the Kennecott Company (the parent corporation) has its own sales outlet for the finished product.

With respect to the Utah Copper Company, the term "from the sale or conversion into money or its equivalent", as used in Section 80-5-57, has been interpreted in the case of Salt Lake County vs. Utah Copper Company, 93 Fed. (2d) 127. The Circuit Court of Appeals there adopted the opinion of the Trial Court as follows:

"The trial court concluded that the phrase 'gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent, of all ores from such mine,' embraced the amount received from sales in such year of blister copper, gold and silver bullion produced in such year, and the amount of the blister copper, gold and silver bullion produced in such year but remaining unsold at the end of the year, the latter amount to be arrived at by appraisal: * * *." (Italics added)

The Court went on to say that the interpretation given to the phrase "sale or conversion into money or its equivalent" [fol. 94] lent "by the taxing authorities over a period of years, which included the appraised value of blister copper not sold as part of the 'gross proceeds' was upheld by the legislative enactment of 1937 (Laws of Utah, 1937, Chapter 101, Page 193), now Section 80-5-55, Utah Code Annotated, 1943; that section provides for the 'Occupation Tax and Assessment Book of Mines in which such book must be specified' (6) amount received for ore and metal if sold; if not sold the value thereof.

In a situation where the ore is not sold but premium payments have been received, the premium payments would be considered a *prepayment* and the appraised value at the ceiling price of the metal would represent the balance of the value of the ore. There would thus be a partial conversion into money by the premium payment.

From the foregoing, it must be determined that the "premium payments" received from the Metals Reserve Company should be included as a part of the gross proceeds under Section 80-5-57. The fact that the money comes from

a federal agency rather than from private industry does not alter the situation in any respect nor does the fact that the "premium payments" are made only on ores produced in excess of the quota have any bearing upon the problem. The "premium payments" are made for the production of the metal which is placed on the market and eventually finds its way into products for the most part purchased by the Federal Government in furtherance of the war effort.

The same conclusion must be reached also as to the occupation tax under Section 80-5-66. The statute there specifically provides that such tax shall be based upon the "gross amount received for or the gross value of metaliferous ore sold". Certainly, it cannot be contended otherwise than that the value of the ore produced over and above the particular quota is represented by the figure of 17¢ for copper, 9½¢ for lead and 11¢ for zinc (this being the total amount received for such ore and is represented by adding the "premium payment" to the ceiling price established).

In conclusion, we wish to quote the definition of "net annual proceeds of a mine" as defined by our Supreme Court in the case of *Mercur Gold Mining and Milling Company vs. Spry*, 16 Utah 222, 52 P. 382:

"By the term 'net annual proceeds of the mine' is *meant* what is annually realized from the product of the mine, over and above all the costs and expenses of obtaining such proceeds and converting the same into money. This construction was afterwards prescribed by section 64, p. 442, of the revenue laws of 1896. The effect of this provision of the constitution was, not to presently tax the annual product of the mines, but to declare that such product should be *taxes* as provided by law."

See also *Tiptic Standard Mining Company vs. Utah County*, 80 Utah 491, 15 P. (2d) 633.

Very truly yours, Grover A. Giles, Attorney General,
by Arthur H. Neilson, Assistant.

AHN:mh.

Approved

22. All taxpayers' statements and returns made by the mining companies involved herein, and all protests, objections and petitions for correction of the valuations and assessments made by the Commission as herein referred to are hereby expressly incorporated in and made a part of this

stipulation, and all assessment records of the Commission and notices of assessment and valuation by the Commission to the taxpayers concerned are incorporated in and hereby made a part of this record.

The matters set forth in paragraphs 1 to 22, inclusive, of the foregoing stipulation contain all the relevant and material facts to the controversy involved herein; and upon said facts the applicable statute shall be interpreted and applied.

Dated this 26th day of June, 1944, at Salt Lake City, Utah.

The State Tax Commission of the State of Utah, by W. L. Skanchy, Its Attorneys; Tintic Standard Mining Company, by Ingebretsen, Ray, Rawlins & Christensen, Its Attorneys; Eureka Lily Con-[fol. 96] solidated Mining Company, by Ingebretsen, Ray, Rawlins & Christensen, Its Attorneys; Park-Utah Consolidated Mining Company, by Ingebretsen, Ray, Rawlins & Christensen, Its Attorneys; Silver King Coalition Mines Company, by R. J. Hogan, Its Attorneys; New Park Mining Company, by Harry Metos, Its Attorneys; Eureka Bullion Mining Company, by Farnsworth & Van Cott, Its Attorneys; International Smelting and Refining Company, by Farnsworth & Van Cott, Its Attorneys; Ohio Copper Company, by Farnsworth & Van Cott, Its Attorneys; Kennecott Copper Corporation, by C. C. Parsons, Its Attorneys; Colorado Consolidated Mining Company, by Ingebretsen, Ray, Rawlins & Christensen, Its Attorneys; National Tunnel and Mines Company, by Farnsworth & Van Cott, Its Attorneys; Combined Metal Reduction Company, by H. Van Dam, Its Attorneys; United States Smelting, Refining and Mining Company, by Cheney, Jensen, Marr & Wilkins, Its Attorneys; Eagle & Blue Bell Mining Company, by Cheney, Jensen, Marr & Wil-[fol. 97] kins, Its Attorneys; Montana-Bingham Consolidated Mining Company, by Cheney, Jensen, Marr & Wilkins, Its Attorneys; Chief Consolidated Mining Company, by Cheney, Jensen, Marr & Wilkins, Its Attorneys; Niagara Mining Company, by Cheney, Jensen, Marr & Wilkins, Its Attorneys. Grover Giles, Attorney General.

EXHIBIT No. 2

(No. 8734)

Establishing the Office of Price Administration and Civilian Supply in the Executive Office of the President and Defining Its Functions and Duties.

By virtue of the authority vested in me by the Constitution and the statutes, and in order to define further the functions and duties of the Office for Emergency Management with respect to the national emergency as declared by the President on September 8, 1939, for the purpose of avoiding profiteering and unwarranted price rises, and of facilitating an adequate supply and the equitable distribution of materials and commodities for civilian use, and finding that the stabilization of prices is in the interest of national defense and that this Order is necessary to increase the efficiency of the defense program, it is hereby ordered:

1. There shall be in the Office for Emergency Management of the Executive Office of the President and Office of Price Administration and Civilian Supply, at the head of which shall be an Administrator appointed by the President. The administrator shall receive compensation at such rate as the President shall determine and, in addition, shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties.

2. Subject to such policies, regulations, and directions as the President may from time to time prescribe, and with [fol. 98] such advice and assistance as may be necessary from the other departments and agencies of the Federal Government, and utilizing the services and facilities of such other departments and agencies to the fullest extent compatible with efficiency, the Administrator shall:

a. Take all lawful steps necessary or appropriate in order (1) to prevent price spiraling, rising costs of living, profiteering, and inflation resulting from market conditions caused by the diversion of large segments of the Nation's resources to the defense program, by interruptions to normal sources of supply, or by other influences growing out of the emergency; (2) to prevent speculative accumulation, withholding, and hoarding of materials and commodities;

(3) to stimulate provision of the necessary supply of materials and commodities required for civilian use, in such manner as not to conflict with the requirements of the War, Navy, and other departments and agencies of the Government, and of foreign governments, for materials, articles, and equipment needed for defense (such requirements are hereinafter referred to as "military defense needs"); and (4) after the satisfaction of military defense needs, to provide, through the determination of policies and the formulation of plans and programs, for the equitable distribution of the residual supply of such materials and commodities among competing civilian demands.

b. Make studies of the Nation's civilian requirements for materials and commodities, the supply of goods and services, the status and trend of prices and factors thereof, and the impact of the defense program upon civilian living standards; exercise the powers of the President in requesting such studies pursuant to Section 336(a) of Title III of the Tariff Act of 1930 (Title 19, U. S. C., Sec. 1336(a)); and conduct such investigations, hold such hearings, and obtain such reports as may be necessary or desirable to carry out this order.

c. Determine and publish, after proper investigation, such maximum prices, commissions, margins, fees, charges, or other elements of cost or price of materials or commodities, as the Administrator may from time to time deem [fol. 99] fair and reasonable; and take all lawful and appropriate steps to facilitate their observance.

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Franklin D. Roosevelt.

The White House, April 11, 1941.

(No. 8875)

Delegation and Coordination of Priority Authority

By virtue of the authority vested in me by the Constitution and statutes of the United States, and in order to define further the functions and duties of the Office for Emergency Management with respect to the unlimited national emergency as declared by the President on May 27, 1941, and

for the purpose of assuring effective coordination of the priority powers and supply allocation activities of the Federal Government in furtherance of and in conformity with the basic defense policies of the President, it is hereby ordered as follows:

3. In order to assure unity of policy and coordinated consideration of all relevant factors involved in the supply and allocation of materials and commodities among the various phases of the defense program and competing civilian demands, there is hereby established within the Office for Emergency Management a Supply Priorities and Allocations Board. The Board shall consist of the Director General and Associate Director General of the Office of Production Management, the Secretary of War, the Secretary of the Navy, the Special Assistant to the President supervising the defense aid program, the Administrator of the Office of Price Administration, and the Chairman of the Economic Defense Board. The Chairman of the Supply Priorities and Allocations Board shall be designated by the President from among the members of the Board. The President shall also appoint an Executive Director of the Board, who will preside in the absence of the Chairman.

[fol. 100] 5. Consistent with the basic defense policies of the President, the Supply Priorities and Allocation Board shall:

a. Determine the total requirements of materials and commodities needed respectively for defense, civilian, and all other purposes; establish policies for the fulfillment of such requirements, and, where necessary, make recommendations to the President relative thereto.

b. Determine policies and make regulations governing allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities among military, economic defense, defense aid, civilian, and other major demands of the total defense program.

6. The Office of Production Management through its Division of Priorities or any other of its divisions or sub-

divisions shall formulate general plans and programs providing for allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities among military requirements, economic defense needs, total civilian demands, defense aid needs, and other major elements of the total defense program. Such general plans and programs shall be submitted to the Supply Priorities and Allocations Board for approval or modification.

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8. The title of the Office of Price Administration and Civilian Supply, established by Executive Order No. 8734 of April 11, 1941, is hereby changed to Office of Price Administration.

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11. Executive Orders No. 8629 of January 7, 1941, and No. 8734 of April 11, 1941, are hereby amended accordingly, and any conflicting provisions of these or other Executive Orders are hereby rescinded.

Franklin D. Roosevelt.

The White House, August 28, 1941.

[fol. 101]

(No. 9024)

Establishing the War Production Board in the Executive Office of the President and Defining Its Functions and Duties.

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to define further the functions and duties of the Office for Emergency Management with respect to the state of war declared to exist by Joint Resolutions of the Congress, approved December 8, 1941, and December 11, 1941, respectively, and for the purpose of assuring the most effective prosecution of war procurement and production, it is hereby ordered as follows:

1. There is established within the Office for Emergency Management of the Executive Office of the President a War

Production Board, hereinafter referred to as the Board.
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2. The Chairman of the War Production Board, with the advice and assistance of the members of the Board, shall:

a. Exercise general direction over the war procurement and production program.

b. Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect thereto as he may deem necessary or appropriate.

c. Perform the functions and exercise the powers vested in the Supply priorities and Allocations Board by Executive Order No. 8875 of August 28, 1941.

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7. The Supply Priorities and Allocations Board established by the Executive Order of August 28, 1941, is hereby abolished, and its personnel, records, and property transferred to the Board. The Executive Orders No. 8629 of January 7, 1941, No. 8875 of August 28, 1941, No. 8891 of September 4, 1941, No. 8942 of November 19, 1941, No. 9001 [fol. 102] of December 27, 1941, and No. 9023 of January 14, 1942, are hereby amended accordingly, and any provisions of these or other pertinent Executive Orders conflicting with this Order are hereby superseded.

Franklin D. Roosevelt.

The White House, January 16, 1942.

Farm Loan Agency

Washington,
 January 12, 1942.

Federal Loan Administrator Jesse Jones today announced at the request of OPM and OPA, Metals Reserve Company has agreed to stimulate the production of zinc, lead and copper through paying a higher price for these metals for production in excess of 1941 output.

Details of the plan and quotas for individual producers will be announced by the Price Administrator.

Mr. Jones' letter to William S. Knudsen and Leon Henderson follows:

January 12, 1942.

"GENTLEMEN: You are advised that, in accordance with your suggestion, Metals Reserve Company will, at your request, for a period of two and one-half years from February 1, 1942, pay 11 cents per pound East St. Louis for zinc, 9 $\frac{1}{4}$ cents per pound New York for lead, and 17 cents per pound Connecticut Valley for copper, for increases above 1941 production governed by quotas to be fixed by you with our approval.

Any metals so acquired by Metals Reserve Company which are not used for or by the government will be subject to your allocation at the ceiling price fixed by the Price Administrator. By this procedure we should get maximum production of these critical and strategic metals for war purposes without increasing the price to the consumer.

"Sincerely yours, Jesse H. Jones, Administrator."

[fol. 103] United States Code Annotated, Title 50:

App. Sec. 633. Amendment of section 1152 of this Appendix.

Subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676) (section 1152 (a) of this Appendix), entitled "An Act to expedite national defense, and for other purposes", as amended by the Act of May-31, 1941 (Public Law Numbered 89, Seventy-seventh Congress), is hereby amended . . .

Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

Emergency Price Control Act of 1942 (New)

Act Jan. 30, 1943, C. 26, 56 Stat. 23

Sec. 901. Purposes; time limit; applicability.

(a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local gov- [fol. 104] ernments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3 (section 903 of this Appendix); and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices, fair and equitable wages, and cost of production.

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Section 902. Prices, rents, and market and renting practices.

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(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store for use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: Provided, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended (Title 15, Secs. 616b, 609j), such determinations shall be made by the Federal Loan Administrator, with the approval of the President, [fol. 105] and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d (Title 15, Secs. 606b, 609j); except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. • • •

Title II—Administration and Enforcement

Sec. 921. Administration.

(a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator").
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Inflation Control Act of 1942 (New).

Act Oct. 2, 1942, C. 578, 56 Stat. 765.

Section 961. Stabilization by President of prices, wages, and salaries affecting cost of living; public utility rate increases.

In order to aid in the effective prosecution of the war the President is authorized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which exist on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: Provided, That no common carrier or other public utility shall make [fol. 106] any general increase in its rates or charges which were in effect on September 15, 1942, unless it first give thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase. October 2, 1942, c. 578, Sec. 1, 56 Stat. 765.

Office of Price Administration.

(For immediate release Monday, February 9, 1942) PY 2458.

Rules and regulations by which United States mining operators may obtain premium prices for overquota production of copper, lead, and zinc were announced today by William L. Batt, Director of Materials, War Production Administration, and Leon Henderson, Administrator of Price Administration.

Premium prices of 17 cents per pound for copper, 11 cents for zinc, 9½ cents for lead will be paid by the Metals Reserve Company for a period of 2½ years beginning February 1, 1942. Should the emergency end before the termination date, Metals Reserve Company has reserved the right to terminate this arrangement on equitable terms.

The premiums will apply to all overquota production after February 1, 1942, regardless of when tonnage quotas are

announced and actual payments begin. By continuing meanwhile to ship through ordinary channels, producers will be assured premium prices for overquota production.

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Purpose of the plan is to expand output of copper, lead, and zinc because of their importance in the production of armaments.

In general, quotas will be fixed to include all output that can reasonably be expected at established market prices for the metals of 12 cents per pound for copper, 8.25 cents for zinc, and 6.50 cents for lead.

Purpose of the premium plan is to compensate operators [fol. 107] for extra costs involved in bringing out additional metal output.

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Text of the joint statement is as follows:

“Joint Statement—War Production Board—

Office of Price Administration

“Premium Price Plan for Copper, Lead, and Zinc

“The expansion of the armament program following the entry of the United States into the war has made it imperative that unusual steps be taken to increase further the output of copper, lead, and zinc because of their prime importance in the production of armaments.

“Rules and regulations governing the application of the premium-price plan under which Metals Reserve Company has announced that it will pay premium prices for production of copper, zinc, and lead in excess of quotas to be established by W. P. B., and O. P. A., were released today by William L. Batt, Director, Materials Division of the War Production Board, and Leon Henderson, Administrator, Office of Price Administration:

“The premium-price plan has been established to make it possible quickly to increase production by mining low-grade submarginal ores, and to develop additional ore reserves.

“Premium prices of 17 cents for copper, 11 cents for zinc, and $9\frac{1}{4}$ cents for lead will be paid for a period of $2\frac{1}{2}$ years beginning February 1, 1942, and ending July 31, 1944.

Should the emergency end before July 31, 1944, Metals Reserve Company has stated that it will reserve the right to terminate this arrangement on equitable terms to be announced in the near future.

Particular attention is called to the fact that premium prices will apply to all overquota production after February 1, 1942, regardless of the time when tonnage quotas are announced and actual payments begin. By continuing meanwhile to ship-through ordinary channels producers will be assured premium prices for overquota production.

[fol. 108] It is also stated that except as provided in sections 5a and 5b of the ensuing instruction, it is the intention that quotas will be fixed to include all output that can reasonably be expected to come out at the established maximum prices of 12 cents for copper, 8.25 cents for zinc, and 6.5 cents for lead. The only purpose of the premium price plan is to compensate for extra costs involved in bringing out additional metal output.

"Labor and management should recognize this act," Mr. Batt stated, "and should cooperate to facilitate production of additional material which will help to promote the satisfaction of the war requirements and to minimize unemployment in the metal fabricating industries due to present shortages."

The principal rules and regulations are as follows:

1. The premium price plan is one of the steps taken to increase production. In accordance with this plan, the Metals Reserve Company has announced that it will pay, for a period of 2½ years beginning February 1, 1942, and ending July 31, 1944, premium prices for the production of copper, lead, and zinc in excess of quotas to be established jointly by War Production Board and Office of Price Administration. These premium prices will be based on 17 cents for copper, 11 cents for zinc, and 9¼ cents for lead.

2. The premium price plan went into operation February 1, 1942. Regardless of the time at which tonnage quotas are announced and regardless of the time at which actual payments under the plan begin, premium payments shall be made for all overquota production in February and subsequent months.

3. A joint committee from the War Production Board and the Office of Price Administration shall fix initial quotas.

4. Quotas shall be established for particular mines or groups of mines herein referred to as a "property", and shall be expressed in terms of a property's monthly rate of production. A property's production shall be included in determining its quota and overquota regardless of whether [fol. 109] that production is converted into metals, metal oxides, or other products.

6. Should any property fail to maintain its quota production in any month or months, premium payments will not be made until the accumulated deficit is made up by over-quota production in subsequent months. Material deficits due to major calamities such as floods or fires will not be so accumulated. If conditions develop which make it impossible for the quota production of a property to be maintained, the Government will consider applications for reduction of the quota. However, the Government reserves the right to restore any initial quota which has been reduced.

13. Premium payments will be based upon metal paid for under the terms of settlement contracts. Quotas, of course, will be fixed on the same basis. If no settlement contracts exist, quotas and premium payments will be computed on the basis of 95, 90, and 85 percent of the metal content in the case of copper, lead, and zinc, respectively. Ores from mines from integrated companies will be treated in the same manner.

General Administrative Order No. 2-34.

War Production Board Manual of Policy and Procedures

Effective date: May 1, 1942.

Subject: Director of Materials.

Section 1. The Director of Materials is responsible for the administration of the premium price plan for copper,

lead, and zinc. Quotas under the premium price plan shall be fixed by agreement between the Director of Materials and the Office of Price Administration.

D. M. Nelson

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[fol. 110] Program for Premium Payments by Metals Reserve Company on Production of Copper, Lead and Zinc in Excess of Monthly Production Quotas.

In effecting the program originally announced by the Honorable Jesse H. Jones on January 12, 1942, Metals Reserve Company will pay a premium on all domestic production of copper, lead and zinc in excess of monthly quotas established by the War Production Board and the Office of Price Administration and approved by Metals Reserve Company, which will reflect the difference between the respective ceiling prices for the materials involved and the equivalent of 17¢ per pound Connecticut Valley for copper, 91¢ per pound New York for lead, and 11¢ per pound East St. Louis for zinc.

With regard to excess production from the usual "custom ores," various smelting companies throughout the United States have been designated as agents for Metals Reserve Company to obtain and transmit to it the necessary data required for the making of the premium payments. Each producer representing himself as eligible for any premium payment in any month must (1) cause the smelting company to which he ships to be furnished, as agent for Metals Reserve Company, with a sworn producer's affidavit (forms thereof can be obtained by the producer from the smelting company) showing, among other things, the amount of material in excess of quota delivered during the month covered by such affidavit for which he has been paid or will be paid and on which he is eligible for a premium, and (2) cause the smelting company to be furnished with all necessary information so as to enable it to supply Metals Reserve Company with a statement setting out all data required for the making of the premium payments.

Following receipt in each month of its agents' and representative's statements, together with the sworn producers' affidavits, Metals Reserve Company will arrange for the premium payments to be made promptly to the producers.

A principal requirement of the program is that any deficiency in monthly deliveries below the monthly production [fol. 111] quota of any producer must be made up in the next succeeding month or months before such producer can receive any premium payment on excess quota production, and the producer's affidavit will be required to show that such deficiency has been made up.

Should the National Emergency come to an end prior to July 31, 1945, Metals Reserve Company will give notice of its intention to terminate the premium program thirty days from the date of the giving of such notice.

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[Note. Blank form of affidavit of producer not reproduced here as it appears at printed page 60.]

Supplementary Regulation No. 4

7 F. R. 3724

"Supplementary Regulation No. 4 to General Maximum Price Regulation—Exceptions

The Price Administrator, pursuant to authority contained in the Emergency Price Control Act of 1942, has determined that in order to effectuate the purposes of that Act, sales or deliveries to the United States or any agency thereof of certain commodities and in certain transactions, and certain other commodities, should be excepted from the General Maximum Price Regulation. Provision for such exception is made in Secs. 1499.9 (a) (16) and 1499.9 (b) (8) and (9) of the General Maximum Price Regulation. A statement of the considerations involved in the issuance of this Supplementary Regulation, issued simultaneously herewith, has been filed with the Division of the Federal Register. For the reasons set forth in that statement, under the authority vested in the Price Ad-

ministrator by the Emergency Price Control Act of 1942, and pursuant to Secs. 1499.9 (a) (16), and 1499.9 (b) (8) and (9) of the General Maximum Price Regulation, Supplementary Regulation No. 4 is hereby issued.

Sec. 1499.29. Exceptions for sales and deliveries to the [fol. 112] United States or any agency thereof of certain commodities and in certain transactions and for certain other commodities. (a) General Maximum Price Regulations shall not apply to sales or deliveries of the following commodities or in the following transactions:

* * * * *

(11) Sales or deliveries of metallic copper, lead, or zinc, or of ores or concentrates containing copper, lead or zinc, to the Metals Reserve Company, or its duly authorized agent or agents pursuant to the premium price plan announced by the Federal Loan Agency, the War Production Board, and the Office of Price Administration.

* * * * *

This Supplementary Regulation No. 4 (Sec. 1499.29) shall become effective May 18, 1942.

(Pub. Law 421, 77th Cong.)

Issued this 13th day of May, 1942.

Leon Henderson, Administrator.

[F. R. Doc. 42-4504; Filed, May 16, 1942; 12:48 p. m.]

Charter of Metals Reserve Company

6 F. R. 2970 as amended by 6 F. R. 5464

"Whereas, Reconstruction Finance Corporation is authorized pursuant to an Act of Congress approved June 25, 1940, to create corporations in order to aid the government of the United States in its national-defense program with power to produce, acquire, and carry strategic and critical materials, as defined by the President; and

Whereas, the President has defined as strategic and critical materials those set forth in Article Third hereof;

Now, therefore, it is stated that:

First. Reconstruction Finance Corporation does hereby create a corporation to be known as Metals Reserve Company.

Second. The location of the principal office of the corporation [fol. 113] shall be in the City of Washington, District of Columbia.

*Third. The objects, purposes and powers of the Corporation shall be:

(a) To produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President;

(b) To purchase and lease land; purchase, lease, build and expand plants; purchase and produce equipment, facilities, machinery, materials, and supplies for the manufacture of strategic and critical materials, arms, ammunition, and implements of war, any other articles, equipment, facilities, and supplies necessary to the national defense, and such other articles, equipment, supplies, and materials as may be required in the manufacture or use of any of the foregoing or otherwise necessary in connection therewith;

(c) To lease, sell, or otherwise dispose of such land, plants, facilities, and machinery to others to engage in such manufacture;

(d) To engage in the manufacture of arms, ammunition, and implements of war;

(e) To produce, lease, purchase, or otherwise acquire railroad equipment (including rolling stock), and commercial aircraft, and parts, equipment, facilities and supplies necessary in connection with such railroad equipment and aircraft, and to lease, sell, or otherwise dispose of the same;

(f) To purchase, lease, build, expand, or otherwise acquire facilities for the training of aviators and to operate or

*Third. As amended "upon request of the Federal Loan Administrator, with the approval of the President of the United States," October 22, 1941.

lease, sell, or otherwise dispose of such facilities to other to engage in such training; and

(g) To take such other action as the President and the Federal Loan Administrator may deem necessary to expedite the national defense program.

The Corporation shall have power and authority to do and perform all acts and things whatsoever which are necessary, suitable, convenient or proper in connection with [fol. 114] or incidental to the foregoing objects, purposes and powers, including but without limitation, the power to borrow and hypothecate, to lend money, to adopt and use a corporate seal, to make contracts, to acquire, hold and dispose of real and personal property, and to sue and be sued in any court of competent jurisdiction.

Fourth. The total authorized capital stock of the corporation shall be five million dollars (\$5,000,000) of which one million dollars (\$1,000,000) shall be paid in immediately and the balance as called. Such stock shall be of one class and be issued for cash only. Said stock shall be transferable only with the approval of the Board of Directors of Metals Reserve Company. Reconstruction Finance Corporation shall subscribe for all the capital stock of the corporation.

Fifth. The corporation shall have existence until dissolved by act of the Board of Directors of Reconstruction Finance Corporation.

Sixth. The stockholders shall not be liable for the debts, contracts or engagements of the corporation except to the extent of unpaid stock subscriptions.

Seventh. The corporation shall be managed by its Board of Directors, officers and agents pursuant to this Charter and the provisions of the By-laws of Metals Reserve Company as prescribed by the Board of Directors of Reconstruction Finance Corporation.

Eighth. This Charter and the By-laws may be amended at any time by the Board of Directors of Reconstruction Finance Corporation.

**Ninth. The Corporation, including its franchise, its capital, reserves, *surplus*, and income shall be exempt from all taxation (which shall, for all purposes, be deemed to

include sales, use, storage, and purchase taxes) now or hereafter imposed by the United States, or any territory, dependency or possession thereof, or by any State, County, municipality or local taxing authority, except that any real property (or buildings which are considered by the laws of [fol. 115] any State to be personal property for taxation purposes) of the Corporation shall be subject to State, territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed.

In witness whereof, Reconstruction Finance Corporation has caused this Charter to be signed by its executive officer, Chairman of its Board of Directors, attested by its Secretary, and has caused its seal to be hereunto affixed this 28th day of June, 1940.

Reconstruction Finance Corporation, by Emil Schram, Chairman. (Seal)

Attest: G. R. Cooksey, Secretary.

[F. R. Doc. 41-3658; Filed, May 22, 1941; 9:28 a. m.]

[F. R. Doc. 41-8007; Filed October 23, 1941; 3:57 p. m.]

Section 5d Reconstruction Finance Corporation Act, as Amended

(48 Stat., chap. 653, pp. 1108-1109; 49 Stat., chap. 2, pp. 4-5.)

Sec. 5d. In order to aid the Government of the United States in its national-defense program, the Corporation is authorized—

(3) When requested by the Federal Loan Administrator, with the approval of the President, to create or organize, at any time prior to July 1, 1943, a corporation or corporations, with power (a) to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President; (b) to purchase and lease land, purchase, lease, build, and expand plants, and purchase and produce equipment, facilities, machinery, materials, and supplies for

**Ninth. As inserted in said charter "upon request of Federal Loan Administrator with the approval of the President of the United States" October 22, 1941.

the manufacture of strategic and critical materials, arms, ammunition, and implements of war, any other articles, equipment, facilities, and supplies necessary to the national defense, and such other articles, equipment, supplies, and materials as may be required in the manufacture or use of any of the foregoing or otherwise necessary in connection [fol. 116] therewith; (c) to lease, sell, or otherwise dispose of such land, plants, facilities, and machinery to others to engage in such manufacture; (d) to engage in such manufacture itself, if the President finds that it is necessary for a Government agency to engage in such manufacture; (e) to produce, lease, purchase, or otherwise acquire railroad equipment (including rolling stock), and commercial aircraft, and parts, equipment, facilities, and supplies necessary in connection with such railroad equipment and aircraft, and to lease, sell, or otherwise dispose of the same; (f) to purchase, lease, build, expand, or otherwise acquire facilities for the training of aviators and to operate or lease, sell, or otherwise dispose of such facilities to others to engage in such training; and (g) to take such other action as the President and the Federal Loan Administrator may deem necessary to expedite the national-defense program, but the aggregate amount of the funds of the Reconstruction Finance Corporation which may be outstanding at any one time for carrying out this clause (g) shall not exceed \$200,000,000:

Any corporation created or organized by the Corporation under the preceding paragraph is also authorized, with the approval of the President, to make payments against the purchase price to be paid for strategic and critical materials in advance of the delivery of such materials.

50 U. S. Code Ann. 311:

Executive Order No. 9250

Oct. 3, 1942, 7 F. R. 7871, as amended by Ex. Ord. No. 9281,
Sept. 25, 1943, 8 F. R. 13083

Providing for the Stabilizing of the National Economy.

By virtue of the authority vested in me by the Constitution and the Statutes, and particularly by the Act of

October 2, 1942 (sections 961-971 of this Appendix), entitled "An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and for Other Purposes" as amended by the Public Debt Act of 1943 (Public [fol. 117] Law 34—78th Congress) (sections 757b, 757c of Title 31, and sections 964, 964a of this Appendix), as President of the United States and Commander in Chief of the Army and Navy, and in order to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war, it is hereby ordered as follows:

Title I—Establishment of an Office of Economic Stabilization

1. There is established in the Office for Emergency Management of the Executive Office of the President an Office of Economic Stabilization at the head of which shall be an Economic Stabilization Director (hereinafter referred to as the Director).

Title V—Profits and Subsidies

2. The Director may direct any Federal department or agency including, but not limited to, the Department of Agriculture (including the Commodity Credit Corporation and the Surplus Marketing Administration), the Department of Commerce, the Reconstruction Finance Corporation, and other corporations organized pursuant to Section 5d of the Reconstruction Finance Corporation Act, as amended (sections 606b, 609j, of Title 15), to use its authority to subsidize and to purchase for resale, if such measures are necessary to insure the maximum necessary production and distribution of any commodity, or to maintain ceiling prices, or to prevent a price rise inconsistent with the purposes of this Order.

(Document No. 13454)

Part 1369—Metal Ores

(MPR 356)

Royalties on Copper, Lead and Zinc Ores

In the judgment of the Price Administrator it is necessary and proper to establish maximum royalties to be paid [fol. 118] on the mining of copper, lead and zinc ores in order to ensure that money paid by the Metals Reserve Company under the Premium Price Plan shall not be dissipated but shall make possible greater production of copper, lead and zinc for the war effort. Such regulation is likewise necessary in order to restrain further increases in royalty payments which will so increase costs of production as to discourage the exploitation of marginal ores of copper, lead and zinc or compel the Metals Reserve Company, pursuant to the Premium Price Plan, to pay substantial larger amounts of public moneys in order to enable mine operators to bear the increased cost entailed in high royalties.

The Administrator has given due consideration to royalties on the mining of copper, lead, and zinc ores which were charged and paid between October 1 and 15, 1941, and relevant factors of general applicability. So far as practicable the Price Administrator has consulted with representatives of lessors and producers.

In the judgment of the Administrator the maximum royalties on copper, lead and zinc ores established by this regulation are and will be generally fair and equitable and will effectuate the purposes of the Emergency Price Control Act of 1942, as amended. A statement of the considerations involved in the issuance of this regulation, issued simultaneously herewith, has been filed with the Division of the Federal Register.

Sec. 1369.51. *Maximum prices payable on the mining of copper, lead and zinc ores.* Under the authority vested in the Price Control Act of 1942, as amended, and Executive Order No. 9250, Maximum Price Regulation No. 356 (Royalties on Copper, Lead and Zinc Ores), which is annexed hereto and made a part hereof, is hereby issued.

Authority: Sec. 1369.51 issued under Pub. Laws 421 and 729, 77th Cong.; E. O. 9250, 7 F. R. 7871.

Maximum Price Regulation 356—Royalties on Copper, Lead and Zinc Ores

[fol. 119] *Sec. 2. Maximum royalties on copper, lead and zinc ores mined from properties and workings under lease on December 31, 1942.* The maximum royalty which may be paid or received on copper, lead and zinc ores mined from any property or working which was under lease on December 31, 1942, shall be a royalty determined according to the terms of the lease in effect on December 31, 1942. A lease shall be considered to have provided for the payment of a royalty determined on the basis of premium or bonus money if during 1942, or within normal settlement time thereafter, a royalty so determined was in fact paid for ores mined during 1942 from the property or working covered by such lease. In no case, however, shall any royalty be calculated, paid or received on the basis of premium or bonus money in excess of 5¢ per pound of copper, 23¼¢ per pound of lead, and 23¼¢ per pound of zinc, which is received from the Metals Reserve Company pursuant to the Premium Price Plan or a special contract with the lessee. Where premium or bonus money is paid by the Metals Reserve Company on the basis of production of concentrates, equivalent figures shall be used in lieu of 23¼¢ per pound of lead and 23¼¢ per pound of zinc. As of the date of the issuance of this regulation \$41.80 per ton for 80% lead concentrates and \$29.70 per ton for 60% zinc concentrates are the equivalent figures for the Tri-State District.

Sec. 3. Maximum royalties on copper, lead and zinc ores mined from properties and workings not under lease on December 31, 1942. * * * No royalty shall, however, be calculated, paid or received on the basis of premium or bonus money in excess of 5¢ per pound for copper, 23¼¢ per pound for lead or 23¼¢ per pound for zinc, or equivalent figures if payment is on the basis of concentrates.

Issued this 1st day of April, 1943.

Prentiss M. Brown, Administrator.

[fol 120] Chapter IX. War Production Board—Subchapter B

Director General for Operations

Authority: Regulations in this subchapter issued under P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 7 F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2a. Pub. Law 671, 76th Cong. as amended by Pub. Laws 89 and 507, 77th Cong.

7

Part 933—Copper

General Preference Order M-9-a as amended Mar. 4, 1943

Whereas the national defense requirements have created a shortage of copper, copper base alloys and products thereof, as hereinafter defined, for defense, for private account, and for export, and it is necessary in public interest and to promote the defense of the United States to conserve the supply and direct the distribution thereof:

Now, therefore, it is hereby ordered.

Sec. 933.2. General Preference Order M-9-a-(a) Definition. For the purpose of this order.

(1) "Copper" means copper metal which has been refined by any process of electrolysis or fire refining to a grade and in a form suitable for fabrication, such as cathodes, wire bars, ingot bars, ingots, cakes, billets, wedge bars or other refined shapes, or copper shot or other forms produced by a refiner.

* * * * *

3. Refiner means any person who produces copper, as heretofore defined, from copper bearing material or scrap by any process of electrolysis or fire refining; "refiner" also includes any person who has such copper produced for him under toll agreement.

4. "Dealer" means one who receives physical delivery of copper and sells or holds the same for sale without change in form.

Fed. Reg. Mar. 5, 1943, p. 2751

b. Allocation of copper (1) Deliveries of copper by [fol. 121] dealers or refiners. No delivery of copper shall

be made by any dealer or refiner except upon presentation by the person requesting the delivery of an allocation certificate duly issued by the Director General for Operations (hereinafter called the Director); except that notwithstanding the foregoing, copper of foreign origin imported under bond or drawback agreement may be re-exported by a refiner pursuant to an export license duly issued by the Office of Export Control, B. E. W.

Issued this 4th day of March, 1943.

Curtis E. Calder, Director General for Operations.

F. R. Doc. 43-3384 Filed Mar. 4, 1943, 9:28 A. M.

Title 32—National Defense

Chapter IX. War Production Board

Subchapter B. Executive Vice Chairman

* Part 933. Copper

Supplementary Order M-9-b, as amended Aug. 24, 1943.

Sec. 933.3 a * * *

b

c

d Delivery to or acceptance of copper by foundries and makers of alloy ingots. Notwithstanding any preference rating, no person shall deliver any copper to a foundry or to a maker of alloy ingots, and no foundry or maker of alloy ingots shall accept any such delivery, except as specifically authorized by the War Production Board.

Issued this 24th day of Aug. 1943.

War Production Board, by J. Joseph Whelan, Recording Secy.

F. R. Doc. 43-13807, Filed Aug. 24, 1943, 11:33 A. M.
(Fed. Reg. Aug. 23, 1943, p. 11715.)

80-5-41. Secretary and Assistants.

The state tax commission shall appoint a secretary, who may or may not be a member, and shall employ a cashier and such other persons as agents, statisticians, expert attorneys and other assistants and employees as may be necessary to perform its duties. (L. 31, p. 217, S. 5983 (g).)

80-5-46. General Powers and Duties.

The powers and duties of the state tax commission are as follows:

- (1) To sue and be sued in its own name.

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80-5-66. Occupation Tax—Annual Exemption.

Except as herein otherwise specifically provided, every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, zinc or other valuable metal in this state shall pay to the State of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore so which tax shall be in addition to all other taxes provided by law. Said tax shall be delinquent on the first day of January next succeeding the calendar year when the ore or metal is sold.

The basis for computing the occupation tax imposed by this act for any year shall be as follows:

(a) If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim from the sale of all ores or metals during the calendar year less a reasonable cost, if any, of transporting the ore from the place where mined to the place where, under the contract of sale, the ore is to be delivered.

(b) If the extracted ore is treated at a mill, smelter or reduction works which receives ores from independent sources and which is owned or controlled by the same person [fol. 123] interested in owning or controlling the mine or mining

claim, such disposal shall be treated as a sale within the meaning of this section for the purpose of determining gross proceeds or otherwise, and in such determination a rate or charge for sampling, assaying, milling and smelting the ores and extracting the metals and minerals therefrom shall be deducted which shall not exceed an amount to be determined by applying the same rates as are applied by such mill, smelter, or reduction works or competing works, to ores of substantially like character and in like quantities received from independent sources. In the event of controversy the tax commission shall have power to determine such rates or charges. Transportation charges may also be deducted as provided in subdivision (a) hereof.

(c) If a mill or other reduction works is operated exclusively in connection with a mine, such mill or reduction works shall be treated as a part of the mine and the cost of operating such mill or reduction works shall, for the purpose of fixing the occupation tax imposed by this act, be regarded as part of the cost of mining and cost of assaying, sampling, smelting, refining, and transportation, only, shall be deducted.

An annual exemption from the payment of the occupation tax imposed by this act upon \$20,000 in gross value of ore shall be allowed to each person, provided but one exemption shall be allowed for one claim or group of claims operating under one ownership as a mine.

80-5-67. Statements

Every person engaged in the business of mining or producing metalliferous ore shall make and file with the tax commission, on or before the tenth day of February of each year beginning with the year 1938 on forms furnished by the tax commission, a statement containing:

(1) The name, description and location of the mine or mining claim owned and operated by him during the preceding calendar year.

(2) The number of tons of ore mined during the preceding calendar year and the disposition made of the same.

[fol. 124] (3) The total amount received during the preceding calendar year from the sale of ore and metals.

(4) If a deduction is claimed for milling, smelting, refining, marketing or transporting the ore or the products of the same from the place where produced to the place where sold, the amount of deduction claimed therefor.

The report shall be signed and sworn to by the individual producer, or by a member of the producing firm, if a partnership, or by the president, secretary or managing officer of the producer, if a corporation. Any wilful false swearing as to the purported material facts set out in such report shall constitute the crime of perjury and shall be punished as such under the criminal code of this state.

80-5-68. Failure to File Statement

If any person engaged in the business of mining metaliferous ores refuses or neglects to make or deliver to the tax commission the statement required by this act the tax commission must fix the amount of the occupation tax from the best information or knowledge it can obtain.

80-5-76. Jurisdiction of Supreme Court—Payment under Protest

No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; provided, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by section 80-11-11, Revised Statutes of Utah, 1933.

Part 984

(General Preference Order M-38, as amended May 26, 1943.)

Section 984.1 General Preference Order M-38 is hereby amended to read as follows:

[fol. 125] The fulfillment of requirements for the defense of the United States has created a shortage in the supply of lead domestically produced for defense, for private account

and for export, and there exists an uncertainty as to future shipments of foreign lead to the United States. The following order is therefore, deemed necessary and appropriate in the public interest and to promote the national defense.

Section 984.1 General Preference Order M-38 (A) Definitions. For the purposes of this order:

(1) "Lead" means and includes lead metal (including antimonial lead) in refinery shapes, whether produced from foreign or domestic ores, from scrap or drosses or from other lead bearing material.

(2) "Lead base alloy" means any alloy containing 50% or more of lead metal by weight.

(3) "Refiner" means any person who produces lead as hereinbefore defined and includes any person who has such lead produced for him under toll agreement.

(4) "Dealer" means any person who procures lead either by importing or from domestic sources for sale or resale without change in form whether or not such person receives title to or physical delivery of the material, and includes selling to agents, warehousemen, and brokers.

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(c) Delivery Schedule.

The War Production Board may from time to time issue special directions requiring any refiner or dealer to file a report on Form PD-124, showing a schedule of his proposed deliveries of lead to be made during any period specified in such directions and including such further information as may be required by instructions accompanying Form PD-124.

(2) Withheld Deliveries.

The War Production Board may from time to time require each refiner to set aside from his production of lead during any calendar month or other specified period (in-
[fol. 126] cluding therein lead produced for him by others under toll agreement and excluding lead produced by him for others under toll agreement) a quantity to be determined and specified by the War Production Board and to

delivered by such refiner only pursuant to the specific written authorization of the War Production Board. Any amount so set aside shall be excluded from the refiner's schedule of proposed deliveries filed under the provisions of subparagraph (c) (1) above.

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(4) Basis of Allocation Directions.

Any allocations, directions or specific authorizations by the War Production Board pursuant to the provisions of paragraphs (c) (2) and (3) above, will be made primarily to insure satisfaction on all war requirements of the United States, both direct and indirect and they may be made in the discretion of the War Production Board without regard to any preference ratings assigned to particular contracts or purchase orders.

(5) Allotment on purchase orders.

The War Production Board may in its discretion require any person seeking to place a purchase order for lead to be delivered by refiner or dealer to place the same with one or more particular refiners or dealers.

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(h) Revocation of M-38-(c).

Conservation Order of M-38-(c) as amended is hereby revoked.

Issued this 26th day of May, 1943.

War Production Board, by J. Joseph Whelan,
Recording Secretary.

8 Federal Register #7008 for 1943.

[fol. 127]

Part 984—Lead

(Revocation of Conservation Order—M-38-a and M-39-b and M-38-d to i inclusive)

Issued on the 26th day of May, 1943.

War Production Board, by J. Joseph Whelan, Recording Secretary.

Citation: 8 Federal Register #7008 for 1943

General Preference Order

M-11-a as amended December 22, 1942.

M-11-a (1) "Zinc oxide" means all grades of zinc oxide including lead free and leaked produced from ores, concentrates, metallic zinc or other primary metal and from soap, dross, ashes, skimmings or other secondary metals.

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(d) Restrictions (1) Each producer of zinc oxide shall set aside from his production each month quantities of zinc oxide to be determined from time to time by the Director General of Operations to be delivered only upon express direction of the Director General of Operations.

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(e) Any person who in any month cannot otherwise obtain zinc oxide in quantities required to fill his preference rated orders may apply for an allocation of zinc oxide for that month by filing with the War Production Board Ref. M-11-a not later than the 15th of the month preceding the month in which the allocation is desired, an application of Form PD-62.

This amendment shall take effect January 1, 1943.

P.D. Reg. 1, as amended, 6 F R 6680; W. P. B. Reg. 1; 7 F R 56 1; E O 9024; 7 F R—329; E. O. 9040; 7 F R—527; E. O. 9125; 7 F. R.—2719; Sec. 2(a) Pub. Law 671; 76 Cong. as amended; Pub. Laws 89 and 507, 77th Cong.

[fol. 128] Issued this 22nd day of December, 1942.

Ernest Kanzler, Director General of Operations.

7 F. R. 10776

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 129] IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH

Pleas and Proceedings before The Honorable Tillman D. Johnson, Judge of the United States District Court for the District of Utah, presiding in the following entitled cause:

No. 680—Civil

SILVER KING COALITION MINES COMPANY, a Corporation,
Plaintiff, /

vs.

STATE TAX COMMISSION, AND J. LAMBERT GIBSON, ROSCOE E. HAMMOND, Milton Twitchell, and Heber Bennion, Jr., constituting said State Tax Commission, Defendants.

COMPLAINT—Filed Sept. 14, 1944

Plaintiff for its cause of action alleges:

1. The grounds upon which the jurisdiction of this court depends are as follows:

(a) Diversity of citizenship between the parties plaintiff and defendants as hereinafter set forth:

(b) The action arises under the constitution and laws of the of the United States, particularly Article 1, Section 8 of the Constitution of the United States empowering Congress to declare war and prosecute the same, and Article 1, Section 10 of the Constitution of the United States denying that power to the states; the Emergency Price Control Act of 1942, approved January 30, 1942, (56 Stat. 23, as amended October 2, 1942, 56 Stat. 767, 50 U. S. C. App. 901, 902(e)), the purpose of which, among others, was, and is, to secure the maximum necessary production of any commodity essential to the prosecution of the war and for that purpose to make subsidy payments to domestic producers in such amounts and in such manner and upon such terms and conditions as may be determined to be necessary to obtain such maximum necessary production; Executive Order [fol. 130] No. 9250, Title V, as amended by Executive Order 9281, (50 U. S. C. App. Section 901, p. 311), pursuant to authority conferred by said Emergency Price Control Act of 1942, by which order Metals Reserve Company, was, and is,

authorized to subsidize, if such measures be necessary to insure the maximum production and distribution of any commodity necessary to the successful prosecution of the war; the Second War Powers Act, being the Act of June 28, 1940 (54 Stat. 676), as amended March 27, 1942, c. 199, Title 111, Section 301, (56 Stat. 177, 50 U. S. C. App. Section 633, p. 274) whereby the President of the United States was, and is authorized to allocate all production in such manner; upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the National defense; and the Fourteenth Amendment to the Constitution of the United States, where it is provided that no State shall deprive any person of property without due process of law.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

2. Plaintiff, Silver King Coalition Mines Company, is now and at all times hereinafter mentioned was, a corporation incorporated and existing under the laws of the State of Nevada and is now and at all times was, a citizen of the State of Nevada and no other State. The defendant, State Tax Commission, is a distinct legal entity created by Article XIII, Section 11 of the Constitution of the State of Utah, and by said Article XIII, Section 11 of said constitution there was vested in said State Tax Commission, solely and exclusively, the power, among others, of administering and supervising the tax laws of the State of Utah, of assessing mines and equalizing the valuation and assessment of property among and within the several counties, of establishing systems of public accounting, reviewing proposed bond issues, and of revising the tax levies and budgets of the local governmental units. And said provisions of the Constitution of the State of Utah were further effectuated by the Statutes of the State of Utah, more particularly c. 5 of Title 80, Utah Code 1943, especially Sections 80-5-37 to 80-5-55, inclusive, and 80-5-65 to 80-5-82, [fol. 131] inclusive, and said State Tax Commission was empowered thereby, more particularly by Sections 80-5-46 (1) and 80-5-76, Utah Code 1943, to sue and be sued in its own name in any court of competent jurisdiction, and by Section 80-5-41 to employ, among others, such attorneys, agents, statisticians, experts and other agents and employees as might be necessary in the performance of its

duties. Said defendant, State Tax Commission, is a citizen of the State of Utah, and no other state. Defendants, J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., are members of, and as such members at all times hereinafter alleged constituted, and now constitute, said State Tax Commission. Each of said defendants last named is a citizens of the State of Utah, and no other State.

3. The controversy herein is wholly between citizens of different States, and the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

4. Plaintiff, Silver King Coalition Mines Company, is a mining corporation, is and has been the owner of and operating under certain mines and mining claims and mining properties, near the City of Park City, Uinta Mining District, County of Summit, State of Utah, and for the reduction of ores mined and produced from plaintiff's said mines and mining claims plaintiff is and has been the owner of a milling plant as part of said mining properties. Said milling plant being situated in the vicinity of the said mines of the plaintiff near the city, in the mining district, county and state aforesaid. That at all times herein mentioned and over the period herein referred to, the plaintiff has reduced at its said mill, the ores mined from its said mines and mining claims to a metallic concentrate. That plaintiff's said mines and mining claims and mining operations aforesaid, among other metals yields and produces lead, zinc and copper concentrates.

5. April 11, 1941, the President of the United States, by his Executive Order No. 8734 as amended by his Executive Order No. 8875 August 28, 1941, (Vol. 9, U. S. C. Cong. Ser. 1941, pp. 852, 867), created the Office of Price Administration, established an Administrator as its head and defined the Administrator's duties, among which duties was that of [fol. 132] prescribing maximum prices and all elements of cost or price of materials or commodities and enforcing their observance; and pursuant to authority thus conferred price schedules were established August 12, 1941 and it was thereby provided, among other things, that no person should sell or offer to sell, buy or offer to buy, or accept delivery of lead, zinc, and copper at prices higher than the following maximum price per pound: Lead, six and one-

half cents per pound; Zinc, eight and one-fourth cents per pound; Copper, twelve cents per pound. And by the signature of the President, on January 30, 1942, the Emergency Price Control Act of 1942 became law (c. 26, 56 Stat. 23; 50 U. S. C. App. Section 901, p. 310). And by said Act said Price Administrator was empowered, on behalf of the United States, in such manner and upon such terms and conditions as he should determine to be necessary to obtain the maximum necessary production of any commodity essential to the successful prosecution of the war, to make subsidy payments to domestic producers of such commodities in such amounts and in such manner and upon such terms and conditions as he should determine to be necessary to obtain such maximum necessary production thereof, (50 U. S. C. App. Section 902(e), p. 319. Metals Reserve Company is, and at all the times herein mentioned was, a corporation created pursuant to Title XV, U. S. C. Section 606 (b), being Section 5 (d) of the Reconstruction Finance Corporation Act as amended (15 U. S. C. Section 606(b), 609(j)), and as such an Agency of the United States. And by said Emergency Price Control Act of 1942 it was provided that "such commodities may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such Section 5(d), except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section (50 U. S. C. App. Section 902(a), p. 319), which is applicable to such commodity at the time of sale or delivery." And the President of the United States made his Executive Order No. 9250, Title V, as amended by his Executive Order No. 9281, (50 U. S. C. App. Section 901, p. 311), and pursuant to the authority conferred upon him by [fol. 133] said Emergency Price Control Act of 1942 created the Office of Economic Stabilization, and at the head of said office he established an Economic Stabilization Director and authorized said Director to direct said Metals Reserve Company, among others of said corporations created or organized pursuant to said Section 5(d), to use its authority to subsidize, where such measure necessary to insure the maximum necessary production of any commodity.

6. That at all times herein mentioned and over the period referred to, the plaintiff has sold F.O.B. Park City, Utah, to the American Smelting and Refining Company, a corporation, all the said lead, zinc and copper produced from its said mining claims and reduced to concentrates at its said mill, on a sampled metal content basis, at the price (less fixed smelting and treating charges) fixed and established by the Office of the Price Administrator as the maximum selling price thereof as aforesaid. The purchase price for said concentrates from the said purchaser being due and payable and owing the plaintiff the date of invoice and shipment.

7. It being found that under said established price ceilings, costs to be encountered in the production of lead, zinc and copper and other metals essential to the successful prosecution of the war were too high to insure the maximum necessary production required for armament and other purposes of war, and lead, zinc and copper and said other metals, in such maximum necessary production being indispensable for said purposes, and stimulation of production of said metals to said maximum necessary production being imperative and being possible only by raising the ceiling prices or by payments of a subsidy for such increased production, the National government, impelled by the war emergency and impelled by the exigencies of war, paid, and still pays, subsidies for production of said metals in excess of quotas established jointly by the War Production Board and the Office of Price Administration. Said subsidies were, and are being, paid by order of the Office of Price Administration, dated February 9, 1942, No. P.M. 2458, and under and pursuant to said order and by virtue of the authority hereinbefore alleged, said Metals Reserve [fol. 134] Company pays, and has paid, a subsidy of two and *three-fourth* cents per pound for lead and two and *three-fourths* cents per pound for zinc and five cents per pound for copper production over and above said fixed quotas, commencing February 1, 1942. Under this subsidy plaintiff was allotted a quota of 150 tons of lead per month, 125 tons of zinc per month and zero on copper for its said mine and mining properties here involved, and it was provided, among other things, that should said mining property fail to maintain its quota production in any calendar month or months, no subsidy would be paid until the accumulated

deficit was made up by over quota production in subsequent months.

8. Said purchaser's payments for said lead, zinc and copper concentrates sold precede said subsidy payments by approximately thirty days. Subsidy payments are in no manner related to the sale of said *concentrates* but are paid by the said Metals Reserve Company for the sole purpose of stimulating production over and above said maximum quota and without regard to the sale or other disposition of the product, nor are said subsidy payments reflected in the product's value.

9. By act of Congress (Revenue Act of 1942, Sections 209, 735, 26 U.S.C. Supp., p. 216) the subsidy payments here involved were defined as special allowances, not income for the purpose of excess profit tax under the Federal Revenue Act. One of the aims of said subsidy plan being that of compensating the mine owner thereby for losses to be incurred by forced or excess mines production.

10. Plaintiff was paid and received during the calendar year 1943, on account of said subsidy payments made by Metals Reserve Company, under the authority heretofore alleged and upon plaintiff's excess lead, zinc and copper production over quota aforesaid from its mining claims, for the said year 1943, the sum of \$453,353.54.

11. At all times herein mentioned it was provided by the Statutes of Utah, that is to say, Section 80-5-66, Utah Code 1943, that "every person engaged in the business of mining or producing ore containing gold, silver, copper, lead, iron, [fol. 135] zinc, or other valuable metals in the State of Utah should pay to the State of Utah an occupation tax equal to one per cent of the gross amount received for, or the gross value of, metalliferous ores sold "during the next preceding calendar year; and it was thereby provided that the basis for computing said occupation tax should be the amount of money, or its equivalent, actually received from the sale of all ores or metals during said calendar year. Every person engaged in the business of mining has been, and is, required to make and file with the defendant, State Tax Commission, each year a statement containing the total amount received during the preceding calendar year from the sale of ores and metals (Section 80-5-67 (3), (4)), and

plaintiff filed with the defendant, State Tax Commission, in due time its statement accordingly.

12. Notwithstanding the facts hereinbefore alleged, said defendant, State Tax Commission, and said other defendants comprising said Commission, erroneously added the said sum of \$453,353.54, the amount of said subsidy payments received by plaintiff as hereinbefore alleged, to the gross amount received by plaintiff from sales of its production made during the calendar year 1943, as though the said sum of \$453,353.54 were actually derived from such sales. Upon the total so obtained, said defendant, State Tax Commission, and said other defendants constituting the membership thereof, have erroneously and without authority of law levied against plaintiff an occupation tax for the year 1944 in the sum of \$18,503.37 as though upon sales of metals made by plaintiff in the year 1943. But the total of plaintiff's sales of metals made during the year 1943 on which said occupation tax should have been computed amounted to the sum of \$1,396,983.32, and thereupon an occupation tax of no more than the sum of \$13,969.83 could have been lawfully levied against this plaintiff, the said sum of \$453,353.54, the amount of said subsidy payments, having been made and received neither for nor on account of "metaliferous ores sold", nor were said subsidy payments in any manner related to sales of any kind or character whatever.

13. That on the 25th day of May, 1944, plaintiff duly remitted and paid the defendant the said sum of \$13,969.83 or [fol. 136] that part and portion of said occupation tax levied and assessed and computed against the sum of \$1,396,983.32, which latter sum represented the amount received by the plaintiff from the actual sale of the said concentrates during the calendar year of 1943 and within the time and in the manner provided by law, to-wit, on the 27th day of May, 1944, the plaintiff filed with the defendant its written petition for the abatement of the unlawful assessment of said tax in the amount of \$4,533.54 and protested the assessment of the same upon the grounds herein alleged and demanded a hearing thereon and thereupon on June 1st, 1944, obtained and received from the defendants, an extension of time within which to pay the said protested portion of said tax. On the 29th day of July, 1944, the defendants denied plaintiff's said petition and protest and unlawfully levied against the plaintiff upon said unlawful assessment a so-

called mine occupation tax for the year 1944 in the sum of \$18,503.37 of which the sum of \$4,533.54 was levied upon the said subsidy paid plaintiff by the national government as aforesaid and said defendants, State Tax Commission, did on the 1st day of August, 1944, and within the extension of time granted for the payment thereof, collect from this plaintiff as and for said tax in part unlawfully levied pursuant to the said unlawful assessment made by the State Tax Commission and said other defendants as hereinbefore alleged, in the further sum of \$4,533.54.

14. The Congress of the United States has conferred no right upon the State to tax said subsidy payments, or to seize or appropriate the same, or any part thereof, or in any manner, or at all, to make said subsidies as source of revenue to the State. The inclusion by the said defendants of said sum of \$453,353.54 in said base upon which said occupation tax was computed by the defendant, State Tax Commission, and said other defendants, and upon which said assessment was made by it and them, and the levy thereupon of said additional tax of \$4,533.54 by it and them, were and are beyond the power or authority of said State Tax Commission or said other defendants, were and are contrary to law, and were and are void. Said attempted and unlawful assessment by said State Tax Commission and said other defendants, and said levy thereupon were [fol. 137] and are an usurpation of power, were and are an unlawful seizure by said defendants of subsidies paid by the national government in the interest of national defense and to further the prosecution of war, were and are an immediate and a direct and substantial interference with, and burden, upon the national government and the exercise by the national government of its legitimate function of prosecuting war, were and are an unlawful seizure by the defendants of subsidy payments the national government directed be paid to this defendant in the exercise by the national government of its power to wage war and, if permitted, the power of Congress to wage war will be impaired and may be destroyed by the act of others. Not only were said subsidy payments made by the national government to this plaintiff to insure the maximum necessary production of essential metal for use by the national government in the waging of war, to induce this plaintiff and other like industries to enter upon an operation in behalf of the national

government and its legitimate function of prosecuting war, and as such secure under the law against seizure by the States or others, but said seizure by said defendants was, and is, wholly without authority from the State of Utah or otherwise or at all, wholly in excess of the power of said defendants, or any of them, was, and is, an arbitrary usurpation of power and a taking of plaintiff's property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 7 of Article 1 of the Constitution of the State of Utah.

15. This plaintiff further alleges that at the time hereinbefore alleged, to-wit, on the 29th day of July, 1944, when said defendant, State Tax Commission, exacted final payment by this plaintiff of said total sum of \$18,503.37, this plaintiff did pay on the 1st day of August, 1944, the balance of said tax in said total sum to the defendant, State Tax Commission, but as to said portion thereof levied upon said unlawful assessment, to-wit, the sum of \$4,533.54 levied upon said subsidy payments in the sum of \$453,353.54, plaintiff made said payment under protest, demanded that said defendant make the record of its office show payment under protest accordingly, which said defendant did, and said sum [fol. 138] accordingly was not carried into the general fund of the State, but was, and is, being held and retained, as by law provided, until it shall have been finally determined that said tax was lawfully or was unlawfully collected.

Wherefore, plaintiff prays judgment against said defendant State Tax Commission, and said other defendants for the sum of \$4,533.54, together with interest thereon at the rate of six per cent per annum from the 1st day of August, 1944, and for plaintiff's costs of suit in this behalf incurred.

Silver King Coalition Mines Company, by S. B. Lamkin, Secretary.

R. J. Hogan, Attorney for Plaintiff, 316 Kearns Building, Salt Lake City, Utah.

(Duly verified.)

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed September 29, 1944

It is hereby stipulated by the parties hereto, through their respective counsel, that this cause of action and that action in this court entitled: Civil Action No. 671, Kennecott Copper Corporation, a corporation, Plaintiff, vs. State Tax Commission, et al. Defendants, may be consolidated for the purpose of trial in this court.

Dated this 28th day of September, 1944.

C. C. Parsons, Attorney for the Plaintiff Kennecott Copper Corporation. R. J. Hogan, Attorney for the Plaintiff Silver King Coalition Mines Company. Grover A. Giles by A. H. Nielsen, Attorney for Defendants in both actions.

[fol. 139] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 29, 1944

Come now the defendants and move the court to dismiss this action on the following grounds:

1. That the court has no jurisdiction over the subject matter of the action for the reason that the matter involved herein is not a controversy between citizens of different states in this, that this suit is in fact against the State of Utah and the State of Utah is not a citizen of any state within the meaning and intent of the law defining this court's jurisdiction;

2. That the court has no jurisdiction over the persons of these defendants for the reason that the State Tax Commission is an agency of the State of Utah and the individual defendants are sued in their representative capacity as members of the State Tax Commission; and that it appears from the body of the complaint that the matter involved is one in which the State of Utah is primarily concerned and that the State of Utah only is concerned with and will be affected by any judgment rendered herein and that therefore the action is essentially an action against the State of Utah;

3. That the complaint herein does not state a claim upon which any relief can be granted by this court.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, State Tax Commission Attorney, Attorneys for Defendants.

Received a copy of the above motion this 29th day of September, 1944.

R. J. Hogan, Attorney for Plaintiff.

[fol. 140] IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—September 29, 1944

On this 29th day of September, 1944, plaintiff appearing by R. J. Hogan, its attorney, and defendant by Arthur H. Nielsen, its attorney, and this case came on for hearing on defendants' motion to dismiss. Defendant attorney consented that ruling on this motion may be the same as in Civil 671, and thereupon the court denied said motion to dismiss. This case consolidated with Civil 671 for purpose of trial, and date of pre-trial set for October 13, 1944, and date of trial set for October 19, 1944.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 11, 1944

Defendants make answer to plaintiff's complaint as follows:

1. For answer to Paragraph 1, defendants deny that there is diversity of citizenship between the parties plaintiff and defendants to this action or that this action arises under the Constitution or laws of the United States as in said Paragraph 1 alleged, or otherwise or at all, or that any such facts exist, as set forth in said paragraph upon which jurisdiction of this court depends.

Defendants admit that the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

2. For answer to Paragraph 2, defendants deny that the defendant, State Tax Commission, is a citizen of the State

of Utah or of any state. Defendants admit the other allegations in said Paragraph 2 contained.

3. For answer to Paragraph 3, defendants deny that the controversy herein is wholly between citizens of different states but admit that the matter in controversy is wholly between citizens of different states but admit that the matter in controversy exceeds the sum of \$3,000.00 exclusive of interest and costs.

By way of affirmative defense to the jurisdictional averments in plaintiff's Paragraphs 1, 2, and 3 contained allege that notwithstanding the State Tax Commission and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell [fol. 141] and Heber Bennion, Jr., members constituting said State Tax Commission, are named as defendants herein, none of said defendants has any individual interest in the controversy; that the relief sought against these defendants, and each of them, is only in their official capacity as representatives of the State of Utah; that the State of Utah is alone to be affected or compelled to pay any judgment which might be rendered against said defendants, and to the State of Utah alone will inure any benefits to accrue or result from any judgment in favor of defendants herein. Defendants, therefore, allege that this action is one in which the State of Utah, though nominally not a party defendant, is, nevertheless, in truth and in fact, the real defendant and that, therefore, there is no diversity of citizenship herein.

Defendants further alleged that this suit is barred by the provisions of the 11th Amendment to the Constitution of the United States which provides that the judicial power of the United States "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State."

4. Defendants have no information concerning the facts alleged in Paragraph 4 of plaintiff's complaint, and therefore, deny the same.

5. Defendants admit the allegations contained in Paragraph 5 of plaintiff's complaint.

6. Defendants have no information concerning the allegations of paragraph 6 of plaintiff's complaint, and therefore, deny the same.

7. For answer to Paragraph 7, defendants deny that Metals Reserve Company pays and has paid a *subsidy* of 2 $\frac{3}{4}$ ¢ per *lb.* for lead and 2 $\frac{3}{4}$ ¢ per *lb.* for zinc and 5¢ per *lb.* for copper production over and above fixed quotas, but allege the facts to be as hereinafter set forth in defendants' affirmative defense.

Defendants admit the other allegations in said paragraph 7 contained.

8. For answer to paragraph 8 of plaintiff's complaint, [fol. 142] defendants deny each and every allegation therein contained.

9. For answer to Paragraph 9, defendants admit that by act of Congress (Revenue Act of 1942, Sections 209, 735, 26 U. S. C. Supp., P. 216), the premium payments here involved were excluded from the provisions of the excess profits tax under the Federal Revenue Act.

Defendants otherwise deny the allegations in said paragraph contained.

10. For answer to paragraph 10, defendants deny the allegations therein contained for want of facts sufficient to form a belief.

11. For answer to paragraph 11, defendants admit that Section 80-5-66, Utah Code Annotated, 1943, provides that:

“ * * * every person engaged in the business of mining or producing ore containing gold, silver, copper lead, iron, zinc or other valuable metal in this state shall pay to the state of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold * * * ”

Defendants further admit that every person in the business of mining is required to make and file with the State Tax Commission each year a statement containing, among other things, the total amount received during the preceding calendar year from the sale of ores and metals. (Section 80-5-67) and that plaintiff filed a statement with the State Tax Commission within the time required by law.

Defendants otherwise deny the allegations contained in said paragraph 11.

12. Defendants deny the allegations contained in paragraph 12.

13. For answer to paragraph 13, defendants admit that plaintiff, on the 25th day of May, 1944, paid to the State Tax Commission the sum of \$13,969.83 and that thereafter, and within the time provided by law, plaintiff filed with the defendant a written petition for the abatement of the balance of the assessment of the occupation tax made by the [fol. 143] State Tax Commission in the amount of \$4,533.54; that said protest was made upon the grounds, as alleged in plaintiff's complaint on file herein, that a hearing thereon was demanded and an extension of time obtained in which to pay said protested portion of tax; that thereafter, on the 29th day of July, 1944, defendants denied plaintiff's petition and protest.

Defendants otherwise deny the allegations contained in said paragraph 13.

14. Defendants deny each and every allegation contained in paragraph 14.

15. For answer to paragraph 15, defendants admit that on the 1st day of August, 1944, plaintiff paid the balance of the assessed tax in the total sum of \$18,503.37 to the defendant, State Tax Commission, and that as to the sum of \$4,533.54, plaintiff made said payment under protest, demanded that said defendant make the record of its office show payment under protest accordingly, which said defendant did and said sum accordingly was not carried into the General Fund of the State but was and is being held and retained as by law provided until it shall have been finally determined whether said tax was lawfully or unlawfully collected.

For further and separate defense, defendants allege as follows:

1. That on February 9, 1942, the Office of Price Administration, pursuant to authority granted by law as in paragraph 5 of plaintiff's complaint set forth, authorized and directed Metals Reserve Company to pay a premium price for ores produced over and above quotas to be fixed jointly by the Offices of Price Administration and the War Production Board, said premium prices to be based on 17 cents for copper, eleven cents for zinc and 9 $\frac{1}{4}$ cents for lead.

2. That Metals Reserve Company on March 7, 1942, issued a statement in which it sets forth that in effecting the

program, as outlined, the said Metals Reserve Company would pay a premium on all domestic production of copper, lead and zinc in excess of monthly quotas established by [fol. 144] the War Production Board and the Office of Price Administration and approved by Metals Reserve Company which will reflect the difference between the respective ceiling prices for the materials involved and the equivalent of 17¢ per pound Connecticut Valley for copper, 9¹/₄¢ per pound New York for lead, and 11¢ per pound East St. Louis for zinc; that said statement further provided that "following receipt in each month of its agents' and representative's statements, together with the sworn producers' affidavits, Metals Reserve Company will arrange for the premium payments to be made promptly to the producers". Thereafter, Metals Reserve Company has paid and continues to pay said premium prices for said ores.

3. That as a condition precedent to receiving premium prices from Metals Reserve Company, a producer must file an affidavit to the effect that it has "produced and delivered" to the smelter the amount of copper, lead and zinc as listed; that its monthly production quota has been filled and "the amount of material specified therein has been produced, and delivered for sale during the month above mentioned".

4. That the premium prices paid by Metals Reserve Company are paid on account of the production and delivery to the smelter or refinery of the over-quota ores and in contemplation of the subsequent sale of said ores for use in the further and more expeditious prosecution of the war.

5. That the amounts received by the plaintiff herein from Metals Reserve Company on account of the production and delivery to the smelter of all ores sold in the calendar year, 1943, are part of the "gross amount received for or the gross value of metalliferous ore sold" as set forth in Section 80-5-66, Utah Code Annotated, 1943.

6. That at the time plaintiff herein filed with defendant, State Tax Commission, the statement required by Section 80-5-67, Utah Code Annotated, 1943, plaintiff failed to include therein the amount of the premium prices received from Metals Reserve Company on account of the ores sold during the calendar year 1943; that thereafter and pursuant

to Subdivision 5 of said Section 80-5-67, the said defendant, [fol. 145] State Tax Commission, requested plaintiff to file such information, which plaintiff failed to do but in lieu thereof, and because it was considered to be approximately the same sum, plaintiff filed with the State Tax Commission a statement setting forth the amount of premiums paid to it by Metals Reserve Company for ores produced and delivered to the smelter during the year 1943; that thereupon and pursuant to authority granted by Section 80-5-68, Utah Code Annotated, 1943, the defendant, State Tax Commission, accepted said amount in the sum of \$453,353.54 as being the amount received by said plaintiff from Metals Reserve Company in connection with the ores sold by plaintiff during the year 1943; that subsequently and pursuant to Section 80-5-66, the defendant, State Tax Commission, lawfully levied and assessed an occupation tax in the sum of \$18,503.37 against the plaintiff herein:

Wherefore, defendants pray judgment that the plaintiff take nothing by reason of its complaint on file herein but that the same be dismissed with costs.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanechy, Attorney for State Tax Commission, Attorney for Defendants.

(Duly verified.)

Received copy of the foregoing answer this 10th day of October, 1944.

R. J. Hogan, Attorney for Plaintiff.

[Note Reporter's transcript of Proceedings on Pre-Trial of October 13, 1944, appears at side folio 24.]

[fol. 146] IN UNITED STATES DISTRICT COURT

AMENDED AFFIRMATIVE DEFENSE—Filed October 18, 1944

Come now the defendants above named and by leave of the court hereby substitute the attached pages numbered

5 to 10 in lieu of defendants' affirmative defense contained on Pages 4, 5, and 6 of defendants' original answer.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanechy, Attorney for State Tax Commission, Attorneys for Defendants.

Received a copy of the foregoing amended affirmative defense this 17th day of October, 1944.

R. J. Hogan per E. Lynch, Attorney for Plaintiff.

For further and separate defense, defendants allege as follows:

1. Section 902e of the Emergency Price Control Act of 1942 which became law on January 30, 1942 (Ch. 26, 56 Stat. 23; 50 U. S. C. App., Sec. 901 et seq.) provides that the administrator whenever he determines that the maximum necessary production is not being obtained or may not be obtained during the ensuing year may, on behalf of the United States, "buy or sell at public or private sale or store or use, such commodities in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof; Provided, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended (Title 15 Sees. 606b, 609j) such determinations shall be made by [fol. 147] the Federal Loan Administrator, with the approval of the President, and notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d (Title 15, Sees. 606b, 609j); except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which

is applicable to such commodity at the time of sale or delivery..

2. Pursuant to authority granted by Secs. 901 and 902 of said Emergency Price Control Act of 1942, the administrator, on April 28, 1942 (7 F. R. 3153 as amended) issued his general maximum price regulation whereby it was provided that no person shall sell or deliver any commodity at a price higher than the maximum price permitted by the regulation (Section 1499.1). Said regulation further provided that the provisions thereof should not apply to such sales and deliveries of commodities as might be specified by supplementary regulations or amendments thereto (Sec. 1499.9). Said general maximum price regulation became effective.

Thereafter, to-wit, on August 12, 1941, and in furtherance of the objects of said Emergency Price Control Act of 1942, the administrator issued his price schedule No. 15 whereby it was provided that on and after February 1, 1942, no person should sell, offer to sell, deliver or transfer copper and no person should buy, offer to buy or accept delivery of copper at a price higher than twelve cents per pound Connecticut Valley provided "that any person may sell or offer to sell, deliver, or transfer copper to Metals Reserve Company or any other government department, agency, or corporation previously approved in writing by the Office of Price Administration, and Metals Reserve Company, or any other government department, agency or corporation so approved by the Office of Price Administration may buy, offer to buy, or accept delivery of copper at prices higher than the maximum prices set forth".

[fol. 148] On January 13, 1942, the administrator issued Price Schedule No. 69 setting forth restrictions as to the sale or delivery of "primary lead" similar to those contained above with respect to copper, provided, however, that the ceiling price for "primary lead" should be 6 $\frac{1}{2}$ ¢ per pound. On January 28, 1942, the administrator issued Price Schedule No. 81 setting forth restrictions as to the sale or delivery of "primary slab zinc" similar to those contained above with respect to copper, provided, however, that the ceiling price for "primary slab zinc" should be 8 $\frac{1}{4}$ ¢ per pound.

Subsequently, the administrator of the Office of Price Administration amended the provisions of the General

Maximum Price Regulation and particularly Section 14909 whereby it was provided that the general maximum price regulation should not apply to "sales or deliveries of metallic copper, lead or zinc to the Metals Reserve Company, or its duly authorized *agents*, or agents, pursuant to the premium price plan announced by the Federal Loan Agency, the War Production Board, and the Office of Price Administration. This amendment became effective May 18, 1942. (7 F. R. 3724).

3. Pursuant to Title 15, U. S. C., Sec. 606b (being the same as Section 5d of the Reconstruction Finance Corporation Act, as amended, 15 U. S. C., Section 606b, 609j) Metals Reserve Company was incorporated on June 28, 1940. (6 F. R., 2970). The articles of incorporation thereof, as amended, set forth the objects, purposes and powers of the corporation to be "to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President". (filed Oct. 3, 1941, 6 F. R. 5464).

4. On January 12, 1942, the Honorable Jesse Jones, as Federal Administrator, pursuant to authority granted under Sec. 5d of the Reconstruction Finance Corporation Act, as amended, announced that Metals Reserve Company would pay a higher price for lead, zinc and copper according to a plan to be announced. The statement further provided that any metals "so required by the Metals Reserve Company which are not used for or by the government will [fol. 149] be subject to your allocation at the ceiling price fixed by the price administrator".

5. On February 9, 1942, a joint statement was issued by the War Production Board and the Office of Price Administration setting forth certain rules and regulations governing the payment of premium prices for over-quota production of copper, lead and zinc. Said statement provides that in accordance with the plan announced, "Metals Reserve Company has announced that it will pay, for a period of two and one-half years beginning February 1, 1942, and ending July 31, 1944, premium prices for the production of copper, lead and zinc in excess of quotas to be established jointly by the War Production Board and the Office of Price Administration. These premium prices will be based on 17¢ for copper, 11¢ for zinc and 9¼¢ for lead".

6. On March 7, 1942, Metals Reserve Company issued its statement which, as subsequently amended, states that in effecting the program as outlined, the said Metals Reserve Company would pay a premium on all domestic production of copper lead and zinc in excess of monthly quotas established by the War Production Board and the Office of Price Administration and approved by Metals Reserve Company which will reflect the difference between respective ceiling prices for the materials involved and the equivalent of 17¢ per pound Connecticut Valley for copper, 9¹/₄¢ per pound New York for lead, and 11¢ per pound East St. Louis for zinc. Each producer representing himself as eligible for premium payment must "(1) cause the smelting company to which he ships to be furnished, as agent for Metals Reserve Company, with a sworn producer's affidavit (forms thereof can be obtained by the producer from the smelting company) showing, among other things, the amount of material in excess of quota delivered during the month covered by such affidavit for which he has been paid or will be paid and on which he is eligible for a premium, and (2) cause the smelting company to be furnished with all necessary information so as to enable it to supply Metals Reserve Company with a statement setting out all the data required for the making of the premium payments". Said statement further provides that "following receipt in each [fol. 150] month of its agents' and representative's statements, together with sworn producers' affidavits, Metals Reserve Company will arrange for the premium payments to be made promptly to the producers". Thereafter, Metals Reserve Company has paid and continues to pay said premium prices for said ores as in said program set forth.

7. The affidavit of the producer requires the producer to certify that it has "produced and delivered" to the smelting company during the particular month the quantities of copper, lead and zinc as listed; that its monthly production quota has been filled and the amount of materials specified therein "has been produced and delivered for sale during the month above mentioned, in addition to the amount of materials in excess of quota produced and delivered as hereinafter listed".

The premium prices paid by Metals Reserve Company to the plaintiff herein are paid on account of the production

and delivery to the smelter as hereinabove set forth of the ores produced in excess of quota. Thereafter, the allocation of said ores is made in accordance with priority ratings as established by the President of the United States pursuant to powers granted by statute (56 Stat. 177, 50 U. S. C. App. Sec. 633).

8. The amounts received by the plaintiff herein from Metals Reserve Company on account of the production and delivery to the smelter pursuant to the program above outlined of all ores sold in the calendar year 1943, are part of the "gross amount received for or the gross value of metaliferous ore sold" as set forth in Section 80-5-66, Utah Code Annotated, 1943.

9. At the time plaintiff herein filed with defendant, State Tax Commission, the statement required by Section 80-5-67, Utah Code Annotated, 1943, plaintiff failed to include therein the amount of the premium prices received from Metals Reserve Company on account of the ores sold during the calendar year 1943. Thereafter and pursuant to Subdivision 5 of said Section 80-5-67, the said defendant, State Tax Commission, requested plaintiff to file such information. Plaintiff thereupon filed with the State Tax Commission a statement setting forth the amount of [fol. 151] premiums paid to it by Metals Reserve Company for ores produced and delivered to the smelter during the year 1943, in the sum of \$453,353.54. The defendant, State Tax Commission, thereafter lawfully levied and assessed an occupation tax in the sum of \$18,503.37 against the plaintiff herein.

Wherefore, defendants pray judgment that the plaintiff take nothing by reason of its complaint on file herein but that the same be dismissed with costs.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants.

[Note: Pre-Trial Order October 13, 1944 appears at side folio 27.]

[Note: Minute Entry—October 27, 1944 appears at side folio 28.]

IN UNITED STATES DISTRICT COURT

JUDGMENT—Entered October 30, 1944

This action having come on regularly for trial beginning October 27, 1944, with plaintiff appearing by R. J. Hogan, its attorney, and defendants by A. H. Nielsen and W. L. Skanechy, its attorneys, and this case was consolidated for purpose of trial with Civil 671, Kennecott Copper Corporation v. State Tax Commission, et al., and a jury of twelve good and lawful persons was duly empaneled and sworn to well and truly try this case and a true verdict render according to the evidence. The jury was excused from the box, and the case was submitted on stipulation. Each side moved for a directed verdict in its favor, and the court heard the arguments of counsel on said motions, and on October 30th, the jurors resumed their places in the jury box and were instructed by the court to return the following verdict in this case:

[fol. 152] "We, the jury, duly empaneled and sworn in the above-entitled cause find the issues joined in favor of the plaintiff, and against the defendants, in the sum of \$4,533.54 with interest from July 29, 1944, at 6% per annum, by direction of the court. Dated: October 30, 1944. Frank Fountain, Foreman."

Wherefore, it is ordered and adjudged by the court on this 30th day of October, 1944, that Silver King Coalition Mines Company, a corporation recover of and from defendant, State Tax Commission, et al., the sum of \$4,533.54 with interest from July 29, 1944, at 6% per annum, together with its costs herein incurred to be taxed upon a verified cost bill and have execution therefore.

Attest: W. B. Wilson, Clerk.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 26, 1945

To the above named plaintiff, Silver King Coalition Mines Company, a corporation, and to R. J. Hogan its Attorney:

Notice is hereby given that the defendants above named hereby appeal to the United States Circuit Court of Appeals

for the Tenth Circuit from the judgment entered by the above-entitled court on the 30th day of October, 1944, in accordance with a directed verdict of the jury, in favor of the plaintiff and against the defendants in the sum of \$4,533.54 with interest from July 29th, 1944, at 6% per annum.

Dated this 26th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants.

[fol. 153] IN UNITED STATES DISTRICT COURT

STIPULATION DISPENSING WITH BOND—Filed January 25, 1945

It is hereby stipulated by and between the parties hereto through their respective attorneys of record that the bond on appeal, or any other bond herein required of the defendants in connection with their appeal to the United States Circuit Court of Appeals for the Tenth Circuit may be dispensed with and the defendants, and each of them, are hereby relieved from the necessity of filing any such bond.

Dated this 26th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants. R. J. Hogan, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

STIPULATION DESIGNATING RECORD ON APPEAL—Filed January 26, 1945

It is hereby stipulated by and between the parties hereto through their respective attorneys of record that for inclusion in the transcript of the record on defendants' appeal herein, the clerk of this court shall transmit under his hand and the seal of the court to the United States Circuit Court of Appeals for the Tenth Circuit the following documents

which will then constitute and present the complete record and all of the proceedings and evidence in this action:

1. Complaint.
2. Stipulation consolidating the above case with case No. 671 for purpose of trial.
3. Motion of defendants to dismiss.
4. Minute entry of September 29th denying defendants' motion to dismiss.
- [fol. 154] 5. Answer of defendants.
6. Reporter's transcript of proceedings on pre-trial held October 13, 1944.
7. Amendment to defendants' answer, pursuant to permission granted in open court.
8. Order on pre-trial dated October 21, 1944.
9. Minute entry of October 27th, 1944.
10. Plaintiff's exhibits 1 and 2 constituting the stipulation of facts and the pertinent statutes and orders and announcements of the various federal agencies, or reporter's transcript thereof.
11. Judgment of the court in accordance with the directed verdict of the jury in favor of the plaintiff and against the defendants, dated October 30, 1944.¹⁰
12. Reporter's transcript of oral decision rendered October 30, 1944.
13. Notice of appeal with date of filing.
14. Stipulation dispensing with bond.
15. Designation of and stipulation as to the record.
16. Statement of points relied on.
17. Clerk's certificate.

Dated this 26th day of January, 1945.

Grover A. Giles, Attorney General; Arthur H. Nielsen, Assistant Attorney General; W. L. Skanchy, Attorney for State Tax Commission, Attorneys for Defendants. R. J. Hogan, Attorney for Plaintiff.

[fol. 155] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND
RELY—Filed February 21, 1945

To the above-named plaintiff, Silver King Coalition Mining
Company, a corporation, and to R. J. Hogan, its attorney

You are hereby notified that the defendants and each of
them intend to rely upon the following points in connection
with their appeal from the judgment entered by the
above-entitled court on the 30th day of October, 1944:

(1) Error of the court in refusing to grant defendants'
motion to dismiss the action, upon the grounds as stated in
said motion.

(2) Error of the court in denying defendants' motion for
a directed verdict in said cause on the evidence and facts
presented to the court by the parties.

(3) Error of the court in granting plaintiff's motion for
a directed verdict on the evidence and facts presented to
the court by the parties.

Grover A. Giles, Attorney General; Arthur H. Nielsen,
Assistant Attorney General; W. L. Skanehele, Attorney
for State Tax Commission; Attorney for Defendants.

Received a copy of the foregoing this 21 day of February
1945.

R. J. Hogan, per E. Lynch, Attorney for Plaintiff

[Note. Reporter's transcript containing proceedings of
October 27, 1944, court's oral decision transcribed, Exhibit
1, the stipulation of facts and Exhibit 2, consisting of various
executive orders, etc. is identical with reporter's transcript
in case No. 3131, State Tax Commission et al., vs
Kennecott Copper Corporation appearing at side folios 3
to 127].

[fols. 156-158]; [Clerk's Certificates to foregoing transcript
omitted in printing.]

[fol. 159] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION

Fourth Day, May Term, Thursday, May 17th, A. D. 1945.
Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

These causes came on to be heard and were argued by counsel, Arthur H. Nielsen, Esquire, appearing for appellants, C. C. Parson, Esquire, appearing for appellees.

Thereupon these causes were submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Arthur H. Nielsen, Assistant Attorney General, (Grover A. Giles, Attorney General, and W. L. Skanechy, State Tax Commission Attorney, were with him on the brief) for Appellants.

C. C. Parsons (Wm. M. McCrea and A. D. Moffat for Kennecott Copper Corporation, and R. J. Hogan, for Silver King Coalition Mines Company, were with him on the brief) for Appellees.

Before Phillips, Bratton and Huxman, Circuit Judges

OPINION—July 23, 1945

HUXMAN, Circuit Judge, delivered the opinion of the court.

These were two separate actions, one instituted by Kennecott Copper Corporation and the other by Silver King Coalition Mines Company, against the State Tax Commission of Utah and the individuals constituting the Commission. The actions were brought in the United States District Court for the District of Utah to recover alleged illegal taxes paid under protest. Both plaintiffs prevailed and the Commission has appealed. While separate appeals were perfected, the cases present identical questions. They were briefed and argued together and will be so treated in this opinion. On account of the conclusion we have

reached on the jurisdictional question, it will not be necessary to discuss or consider in detail the nature or character of the taxes in question.

Appellant urges that these suits were actions against the State of Utah and that Utah has not waived its immunity from suit in the federal courts under the Eleventh Amendment to the United States Constitution.

We think the position that these actions are suits against the State is well taken. The suits were filed against the State Tax Commission and against the members of the Tax Commission as individuals. Whether a suit is one against a state is not to be determined alone from the mold in which the pleadings are cast. The names of the titular parties do not determine the question. If the impact of the judgment is felt by the state, then it is in fact the real party in interest. It has been held that a suit against an officer of a state for a money judgment which the state was required to satisfy was a suit against the state. See *Ex parte New York*, 256 U. S. 490, 500.

Utah has comprehensive statutes dealing with the assessment and collection of taxes and with the right of tax payers to challenge the collection of taxes claimed to be illegal for any reason.¹ These statutes provide for the assessment of mines by the State Tax Commission, and require the Commission to keep records of assessments of mines. They provide for notice of assessments, opportunity for hearings before the Commission and correction of assessments, and for application to the Supreme Court by writ of certiorari for review of the decisions of the Commission. Section 80-5-76 provides that no court other than the Supreme Court shall have jurisdiction to review, alter or annul a decision of the Commission. Section 80-11-13 provides that any tax paid under protest shall not be covered into the general fund but shall be held and retained by the State Treasurer until the time for filing an action for its recovery shall have expired, and if such an action is filed, until it has been finally determined, and that if the tax is determined to be illegal, the officer collecting the tax shall approve a claim for the same and the [fol. 161] State Treasurer shall then repay the same, together with costs and interest, from any unappropriated

¹ See Title 80, Revenue & Taxation, Utah Code Ann., 1943.

funds in the hands of the Treasurer, or in case it is necessary, a deficit shall be authorized.

From the above general view of the Utah Statutes, it is clearly apparent that Utah is the real defendant in these suits. The funds are in its possession as escrow holder. If the judgments which the appellees recovered stand, the State Treasurer, who had nothing to do with the collection of the taxes, is by law required to repay them from funds which he holds for that purpose. Appellees recognized that these were proceedings against the State to recover funds held by it in escrow, and not suits against the individual members of the Tax Commission to recover a personal judgment on account of their wrongful acts when they filed their petitions. Their petitions alleged that they paid the tax under protest and demanded that the Commission make the records required in such cases, and that the money had not been covered into the general fund of the state but was being retained as by law required until it was finally determined whether the tax had been unlawfully collected. If these were suits against the individual members of the Commission for a personal judgment, these allegations would be surplusage and immaterial to the issue.

Utah has waived its immunity from suit and has consented to be sued in actions for the recovery of taxes, which it is claimed have been illegally exacted. But has it also consented to be sued in the federal court?

The pertinent part of Section 80-5-76 Utah Code, Annotated, 1943, from which this question must be answered, provides that: "Any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by Section 80-11-11." It is argued that the phrase "any court of competent jurisdiction" has generally been construed to include federal courts where jurisdictional facts are present, and that there is nothing in the context of the statute to indicate that Utah did not intend to embrace a federal court in its waiver of immunity from suit. The question here is in what sense did Utah use this phrase [fol. 162] when it waived its immunity from suit? It had two immunities—it was absolutely immune from suit, and in addition thereto was also immune from suit in federal courts. Waiving its immunity from suit for the recovery of illegal taxes did not confer jurisdiction on federal courts

to entertain such actions unless the State in addition expressly consented that such a suit might be brought in the federal courts. *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, and kindred cases, upon which appellees rely, are not in point on this question. In the *Blackburn* case the Supreme Court considered a federal statute which required one claiming an adverse interest in a mining claim to institute an action within a specified time to establish the same in any court of competent jurisdiction. The action in that case was filed in the state court, and it was contended that such court was without jurisdiction. The Supreme Court merely held that what the statute did was to require a claimant to bring an action and that it evidenced no Congressional intent to restrict the right which the litigant had sans the statute to choose the forum in which he would bring the action. Without the statute an action to quiet title could have been instituted in the state court or in the federal court if jurisdictional requirements were present. The Supreme Court merely said that Congress did not by the passage of this Act intend to bar any of the doors through which a litigant might go in bringing such an action.

In our opinion it is not sufficient to say that there is nothing in the context of the statute to indicate that Utah did not intend to embrace the federal court in its waiver of immunity from suit. Before it can be sued in such courts, the statute must use language which evidences a clear intent to submit to the jurisdiction of federal courts. We think the rule which must guide us in interpreting this language is laid down in *Great Western Ins. Co. v. Read*, 322 U. S. 47, where the Supreme Court said:

"When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts [fol. 163] * * * when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

This language was repeated in substance in *Ford Motor Company v. Department of Treasury*, 323 U. S. 459. Both of these cases construed statutes very similar to the Utah statute and in both instances the Supreme Court held that the waiver of those statutes from immunity to suit did not constitute a waiver of the additional immunity from such suit in federal court. The statutes, while not identical with the Utah statute, are very similar, and we think the decisions in these two cases control the question here.

The statute of Indiana which was considered by the Supreme Court in the *Ford Motor Company* case, authorized "action or suit against the department in any court of competent jurisdiction, and the circuit or superior court of the county in which the taxpayer resides or is located, shall have original jurisdiction" Significance is claimed for the language which refers to the Circuit Court or Superior Court of the county in which the taxpayer resides. No comparable language is found in the Utah statute. But the Oklahoma statute, like the Utah statute, contains no language similar to that in the Indiana statute. The Oklahoma statute provides for suit "in the court having jurisdiction thereof."

In considering whether Utah intended to consent to suit only in the state court or whether it intended to waive its further immunity from suit in the federal court, it is not sufficient to merely consider the provision of Section 80-5-76 which authorizes suit in "any court of competent jurisdiction." We must look to the entire plan of tax levy and collection. When so viewed, we think it is clear that Utah contemplates that proceedings for the levy, collection and resistance of taxes which it is claimed are illegally levied, shall be carried on within the framework of the state's government, including its courts. As pointed out, Utah has a comprehensive statute providing for the levy and collection of taxes, including the right of a taxpayer to challenge the [fol. 164] tax. The occupation taxes in question here are levied by the State Tax Commission. There are provisions in the statute for notice of assessment, opportunity for protest, and hearings before the Commission, and for appeal to the Supreme Court of the state. Section 80-5-76 which gives the right to sue in any court of competent jurisdiction for the recovery of this particular tax provides that no court in the state except the Supreme Court has jurisdiction to

review, alter or annul any decision of the Tax Commission or to suspend or delay the operation thereof. Without analyzing these statutes in minute detail, it is our conclusion that they contemplate a tax process and proceeding within the state framework and that the right of suit given by Section 80-5-76 was limited to suit in the state court.

In any event, there is in our opinion no such clear declaration in the statute of the intention of Utah to submit to suit in the federal courts as would in the absence of a decision to that effect by the Supreme Court of Utah justify us in giving the statute such a broad interpretation.

It is urged that the statutes of Utah manifest a state policy of permitting claims against the state to be prosecuted in federal courts. We think an analysis of these statutes leads to a contrary conclusion. Section 80-11-11 which confers the right upon any taxpayer to sue for the recovery of illegal taxes was enacted in 1896 in substantially its present form. Prior to 1933 it did not include the right to sue the state. In 1933 it was amended by adding the words "state . . . or other taxing unit." At all times it used the phrase "in any court of competent jurisdiction." The section in question, 80-5-76, was passed in 1937. Again the Legislature used the phrase "in any court of competent jurisdiction." But in 1939, when a statute was passed consenting that suits in certain classes of cases might be brought against the state, the language employed was that suit might be filed "in any court of this state or of the United States."² It would seem reasonable to assume that if by the use of the language in question throughout the years, including the Act of 1937, the state had meant and intended to confer jurisdiction upon federal courts to [fol. 165] entertain such suits, it would have again employed the same language in the Act of 1939. But in that statute the state expressly named the federal courts.

Finally, it is contended that Utah by administrative interpretation and conduct has firmly established the right of litigants to use the federal courts in actions against the state for the recovery of taxes. A number of cases are cited to sustain this contention. All of them are cases in which the county rather than the state was the party litigant. No case in which the state was a party to a suit in federal court

² Utah Code Ann., 1943, Sec. 104-3-27.

without its consent is cited, nor has any been found. Counties or subdivisions lesser than the state are not immune from suit in the federal court under the Eleventh Amendment. *Lincoln County v. Luning*, 133 U. S. 529.

The judgments are severally REVERSED, and the causes are REMANDED, with directions to dismiss the actions without prejudice to the filing of an action in proper courts of the State.

DISSENTING OPINION

PHILLIPS, Circuit Judge, dissenting:

Section 80-5-66, Utah Code Ann. 1943, imposes an occupation tax on every person engaged in the business of mining or producing valuable metalliferous ore "equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold." Section 80-5-81, Utah Code Ann. 1943, provides that all such taxes shall be paid to the State Tax Commission and by it paid over to the state treasurer. Section 80-5-76, Utah Code Ann. 1943, provides that "any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by § 80-11-11, Revised Statutes of Utah, 1933." Section 80-11-11, supra, provides that where a party, whose property is taxed, or from whom a tax is demanded or enforced, deems such tax unlawful, he may pay the same under protest to the officers designated and authorized by law to collect the same, and thereupon "may bring an action in any court of competent jurisdiction against the officer to whom said tax . . . was paid, or against the state, county, municipality or other [fol. 166] taxing unit on whose behalf the same was collected, to recover said tax."

Section 80-11-13, Utah Code Ann. 1943, provides that where a tax is paid to the state under protest, it "shall not be covered into the general fund but shall be held and retained by the state treasurer . . . until the time for the filing of an action for the recovery" of such tax, "and in case an action has been filed, until it shall have been finally determined that" such "tax . . . was lawfully or unlawfully collected"; that in case it shall be determined that such tax was unlawfully collected, the officer collecting

¹ §80-11-11, Utah Code Ann. 1943.

the same shall forthwith approve a claim for the amount of the tax adjudged to have been unlawfully collected, together with costs and interest, and that any amount in excess of the tax required to pay such claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer.

The word "any" is equivalent to, and has the force of, every or each one of all.² It is all-comprehensive and, unless limited by the context, includes all persons and things referred to indiscriminately.³

Where not limited by the context, the phrase "any court of competent jurisdiction" includes a federal court, as well as a state court, where facts requisite to federal jurisdiction are present.⁴

² *Hopkins v. Sanders*, 172 Mich. 227, 137 N. W. 709, 713; *Roedler v. Vandalia Bus Lines, Inc.*, 281 Ill. App. 520, 523; *Heyler v. City of Watertown*, 16 S. D. 25, 91 N. W. 334; *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422, 425; *Bouvier's Law Dictionary, Unabridged, Rawle's 3d Rev., Vol. 1, p. 205.*

³ *Orme v. Atlas Gas & Oil Co., — Minn. —*, 13 N. W. 2d 757, 763.

See, also, *Stout v. Simpson*, 34 Okla. 129, 124 P. 754, 756.

⁴ See *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571; *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 506; and *Chambers v. Harrington*, 111 U. S. 350, construing the phrase "a court of competent jurisdiction" embraced in § 2326, Rev. Stat., 30 U. S. C. A. § 30, providing for what is known in the mining regions as an "adverse suit";

Regan v. Kroger Grocery & Baking Co., 386 Ill. 284, 54 N. E. 2d 210; and *Miller v. Municipal Court of City of Los Angeles*, 22 Cal. 2d 818, 142 P. 2d 297, 308, construing the phrase "in any court of competent jurisdiction" in § 205(e) of the Emergency Price Control Act of 1942, 50 U. S. C. A. App. § 901;

Stringer v. Griffin Grocery Co., Tex. Civ. App., 149 S. W. 2d 158, 160; *Booth v. Montgomery Ward & Co., Inc.*, D. C. Neb. 44 F. Supp. 451; *Donahue v. Susquehanna Collieries Co.*, 3 Cir., 138 F. 2d 3; *Hargrave v. Mid-Continent Petroleum Corp.*, D. C. Okl., 36 F. Supp. 233; and *Wingate v. General Auto Parts Co.*, D. C. Mo., 40 F. Supp. 364, construing the phrase "any court of competent jurisdiction" in § 16 of the Fair Labor Standards Act of 1938, 29 U. S.

[fol. 167] In *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 506, the court said:

"When in section 2326, Rev. Stat., Congress authorized that which is familiarly known in the mining regions as an 'adverse suit,' it simply declared that the adverse claimant should commence proceedings 'in a court of competent jurisdiction.' It did not in express language prescribe either a Federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so."

There is nothing in the Utah statutes indicating an intention on the part of the legislature that the phrase "any court of competent jurisdiction" should not embrace federal courts. In that respect, the instant case is distinguishable from *Great Northern Ins. Co. v. Read*, 322 U. S. 47. The *Read* case was a suit to recover taxes paid under protest brought under 68 O. S. 1941, § 15.50. The statute in that case provides that "All such suits shall be brought in the Court having jurisdiction thereof, and they shall have precedence therein," and directs the form of judgment that shall be entered. Clearly, the Oklahoma legislature could not direct a federal court to give precedence to suits brought therein for the recovery of taxes. Nor could it direct the manner and method of entering judgment in a federal court. In the *Read* case, the Supreme Court said:

[fol. 168] "Furthermore, § 12665 gives directions to the Oklahoma officer as to his obligations, requires the

C. A. § 216(b), which provides for suits by employees to recover liability of employer for violating §§ 6 and 7 of such Act;

In re *Chicago & E. I. Ry. Co.*, 7 Cir., 121 F. 2d 785, construing § 77, sub. j, of the Bankruptcy Act, 11 U. S. C. A. § 205, sub. j, which provides that suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction.

court to give precedence to these cases and directs the kind of judgment to be returned, see note 1, supra, which is quite different in language, if not in effect, from the judgment a federal court would render. It is clear to us that the legislature of Oklahoma was consenting to suit in its own courts only."

Moreover, it is the public policy of Utah to permit suits against the state, to which the state has consented, to be brought both in the state and federal courts. Section 104-3-27, Utah Code Ann. 1943, originally enacted in 1939, in part provides:

"* * * the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure an adjudication touching any mortgage or other lien the state of Utah may have or claim on the property involved. * * *

In this respect, the instant case is distinguishable from *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U. S. 459. That, too, was a case to recover taxes paid under protest under § 64-2614(a) of Burns, Indiana Stat. Ann. 1943 Replacement. That section, in part, provides:

"* * * Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected: * * *

Section 4-1501, Burns, Indiana Stat. Ann. 1933, provides ○[fol. 169] that any person or persons having a claim against the state, arising, at law or in equity, out of a contract, express or implied, may bring suit therefor against the state

in the superior court of Marion County, Indiana, and that jurisdiction is vested upon such court to hear and determine such action. Indiana thereby manifests a state policy to permit claims against the state to be prosecuted only in her own courts.

Furthermore, the Supreme Court of the United States stated that the provision in the Indiana statute which vests original jurisdiction in the "circuit or superior court of the county in which the taxpayer resides or is located" indicates that the state legislature contemplated suit in the state courts.

In the instant case, neither the context of the statute nor the public policy of the state of Utah indicates that the phrase "in any court of competent jurisdiction" should be restricted to state courts.

For the reasons indicated, I respectfully dissent.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, No. 3131

Fortieth Day, May Term, Monday, July 23rd, A. D. 1945.
Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with directions to dismiss the action without prejudice to the filing of an action in the proper court of the State; and that State Tax Commission and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., constituting said State Tax Commission, appellants, have and recover of and from Kennecott Copper Corporation, a corporation, appellee, their costs herein.

[fols. 170-171] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT, No. 3132

Fortieth Day, May Term, Monday, July 23rd, A. D. 1945.
Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said district court with directions to dismiss the action without prejudice to the filing of an action in the proper court of the State; and that State Tax Commission and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., constituting said State Tax Commission appellants, have and recover of and from Silver King Coalition Mines Company, a corporation, appellee, their costs herein.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 172] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 424

ORDER ALLOWING CERTIORARI—Filed November 5, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice and Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 173] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1945

No. 425

ORDER ALLOWING CERTIORARI—Filed November 5, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice and Mr. Justice Jackson took no part in the consideration or decision of this application.

Endorsed on cover: Enter C. C. Parsons.. File No. 50127, 50128. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 424. Kennecott Copper Corporation, Petitioner, vs. State Tax Commission; and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., Constituting said State Tax Commission. Term No. 425. Silver King Coalition Mines Company, Petitioner, vs. State Tax Commission; and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., Constituting said State Tax Commission. Petition for writs of certiorari and exhibit thereto. Filed September 12, 1945. Term No. 424, O. T. 1945; 425, O. T. 1945.

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